Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JAMES KNISKERN, et al.,
Petitioners,

v.

RON AMSTUTZ, et al.,
Respondents.

On Petition for Writ of Certiorari
To the Ohio Supreme Court & Ohio Court of Appeals,
Eighth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the Respondents so far exceeded the bounds of their legitimate legislative authority by passing legislation that mooted Petitioners' cases against the State & its political subdivisions pending before the Ohio Supreme Court, when Respondents voted for and enacted Am.Sub.H.B. No.350, that was adjudicated in Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451 (1999), to have usurped the judicial authority of the State, -- was found to have violated the separation of powers doctrine, -- was found to have violated Ohio's Constitution one subject rule, and -- was found to be unconstitutional "*in toto*", so as to render Respondents liable in their individual capacity to Petitioners in damages, presumed or otherwise, under 42 U.S.C. § 1983, and thereby preclude an absolute immunity summary judgment in Respondents' favor ?

II

Whether Respondents are subject to 42 U.S.C. § 1983 liability to Petitioners, for having mooted Petitioners' cases against the State & its political subdivisions, with legislation that usurped the State's judicial authority, that impaired the State's of Ohio's statutory, unilateral contract in R.C. § 2743.02(A)(1), with Petitioners, in violation of Article I § 10 of the U.S. Constitution, wherein the State promised the Petitioners, that upon their filing of their action against the State in the Ohio Court of Claims, and waiving all their rights against State personnel, the State in turn agreed to have its liability determined in accordance with the same rules of law applicable to suits between private parties and waive its immunity from liability and consent to be sued?

QUESTIONS PRESENTED (continued)

III

Whether Respondents' judicial removal of the State of the Ohio Supreme Court's constitutional jurisdictional authority, Article IV, § (2)(B)(2)(e), to hear or otherwise grant a discretionary appeal upon issues of public or great general interest, from Petitioners' pending Memorandum, by mooting the statutory predicate in Petitioners' tort case against the State & its political subdivisions that otherwise jurisdictionally qualified for the discretionary appeal, with legislation adjudicated to have usurped the judicial authority of the State, subjects Respondents to liablity in their individual capacity to Petitioners in their 42 U.S.C. § 1983 damage action, pursuant to the Petitioners' federally protected rights under the 14th Amendment § 1, Due Process & Equal Protection clause to the U.S. Constitution and under the Separation of Powers Doctrine ?

IV

Whether Petitioners' were subject to restraint of their right to speak by being prohibited from making extra judicial statements during the appellate process of their 42 U.S.C. § 1983, case by Ohio's Disciplinary Rules, DR 7-107(A), contrary to Petitioners' U.S. First Amendment right of free speech and to Petitioners' speaking remedy authorized in Bogan v. Scott Harris, 523 U.S 44, (1998) "to vote them out of office", as a consequence of the voidable, summary judgment opinion, that attacked the informational validity of Petitioners' Complaint against Respondents, rendered by the visiting judge, acting outside the adjudicating authority of the Cuyahoga County Common Pleas Court's Local Rule 15(B), so as to remove Petitioners' right to legitimately rely upon their Complaint as qualifying as and exception under DR 7-107(B)(2), as "information contained in a public record"

QUESTIONS PRESENTED (continued)

V

Whether the State of Ohio subjects itself to 42 U.S.C § 1983 liability and becomes a party defendant to the cause it is defending by waiver or otherwise, by denying Petitioners their right to adjudicate their 42 U.S.C. § 1983 suit in State Court against Respondents, sued in their individual capacity, in accordance with federal law and 14th Amendment constitutional principles of due process and equal protection, when the Attorney General, of Ohio, following the Sheward, adjudication, supra, without filing a Motion to Intervene in accordance with Civil Rule 24, and without reserving the State's sovereign immunity, compelled by R.C. § 109.02, enters a general appearance in the State's Common Pleas Court, by filing answers to the Complaint and by objections to interrogatories conceals the identity of the Lobbyists on behalf of the Respondents, contrary to Hafer v. Melo Jr., 502 U.S. 21 (1991) that prohibits the use of the State treasury funds in Respondents' defense, when R.C. § 109.02 makes any judgment Petitioners obtain voidable because Respondents are denied their Due Process right to their own counsel and the Courts below deny Petitioners' seasonable Motion to Strike the Attorney General's answers?

VI

Whether the State in its defense of the Respondents to Petitioners' 42 U.S.C. § 1983 litigation of their case, co-opted Respondents' ultra vires acts and committed constitutional torts against Petitioners for which damages must be presumed?

QUESTIONS PRESENTED (continued)

VII

Whether, S.B. 108, by its nexus and inherent nature as reviving, remedial, legislation to repealed Am.Sub.H.B. No. 350, prima facie violates Ohio Constitution's one subject rule, and represents a continuous usurpation of judicial power depriving Petitioners of their U.S 14th Amendment Due Process and Equal Protection rights applicable to 42 U.S.C § 1983 cases tried in State Courts, -- both as a consequence of depriving the Petitioners of their jurisdictional predicate in their Motion For Reconsideration of their Memorandum for a discretionary appeal in their § 1983 case -- and depriving the Ohio Supreme Court of its jurisdiction under Ohio Constitution's Article IV, § 2(B)(2)(e) to grant it, -- through the disqualification of Petitioners' legal standing in Sheward, to challenge such legislation, as unconstitutional and as a usurpation of judicial authority under Ohio Constitution's one subject rule?

LIST OF PARTIES

PETITIONERS:
James Kniskern, Individually and as Administrator of the Estates of Cynthia Ann Cavaliere, Jennifer Kniskern and Felina Cavaliere;

Guy Cavaliere M.D.;

Joanna Cavaliere, a Minor, by and through their Father and Natural Guardian, Guy Cavaliere

Maria Cavaliere

RESPONDENTS:
The following defendants are sued in their individual capacity for their actions as STATE REPRESENTATIVE of the OHIO HOUSE OF REPRESENTATIVES of the 121st GENERAL ASSEMBLY OF OHIO:

Ron Amstutz
William Batchelder
Samuel T. Bateman
Ann Womer Benjamin
Louis W. Blessing Jr.
Charles R. Brading
Jim Buchy
John A. Carey Jr.
Gary Cates
Robert L. Corbin
Edward K. Core
Rex A. Damschroder
Jo Ann Davidson
John G. Garcia
Randall Gardner
Diane V. Grendell

Joseph E. Haines
Bill Harris
Richard A. Hodges
Ron Hood
Jay Hottinger
Thomas W. Johnson
Jim Jordan
Edward F. Kasputis
Gene Krebs
Joan W. Lawrence
Jerome F. Luebbers
James W. Mason
Priscilla D. Mead
Kerry Metzger
Jon D. Myers
Robert E. Netzley
Jacuelyn K. O'Brien
Lynn Olman
Joy Padgett
Sally A. Perz
Twyla Roman
Amy Salerno
Frank S. Sawyer
William Schuck
Robert L. Schuler
J. Kirk Schuring
Raymond E. Sines
Dennis Stapleton
William Taylor
George Terwilleger
E.J. Thomas
William E. Thompson
Patrick J. Tiberi
Dale N. Van Vyven
Rose Vesper

Lynn Wachtmann
Cheryl J. Winker

The following defendants are sued in their individual capacity for their actions as STATE SENATOR of the OHIO SENATA of the 121st GENERAL ASSEMBLY OF OHIO:

Stanley J. Aronoff
James Carnes
Robert R. Cupp
Navy Chiles Dix
Grace L. Drake
Richard H. Finan
M. Ben Gaeth
Charles F. Horn
Janet C. Howard
Bruce Johnson
Merle Grace Kearns
Scott R. Nein
W. Scott Oelslager
Roy L. Ray
Richard P. Schafrath
Gary C. Suhadonik
Eugene J. Watts
Doug White
Steven Yarbrough

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

Petitioners respectfully pray that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

The opinion dated June 27, 2001 of the highest state court to review the merits is The Ohio Court of Appeals, Eighth Appellate District. It appears at Apdx A pg. 1. It is reported in 144 Ohio App.3d 495, 760 N.E.2d 876. The unreported Opinion and Journal Entry of the Ohio Cuyahoga County Court of Common Pleas, dated July 24, 2000, appears at Apdx. C, pg. 12.

STATEMENT OF JURISDICTION

The date on which the highest state court decided Petitioners case was The Ohio Supreme Court Journal Entry declining jurisdiction dated October 24, 2001, and reported in 93 Ohio St.3d 1458, 756 N.E.2d 1235, and appears in Apdx. D, pg. 23.

A timely petition for rehearing was thereafter denied on the December 5, 2001, and reported in 93 Ohio St.3d 1499, 758 N.E.2d 1149, and appears in Apdx. E, at pg 25.

The jurisdiction of this Court is invoked under Article III, Section 2 of the U.S. Constitution,. The

jurisdiction of this Court is also invoked under 28 USC § 1257(a) by virtue of 42 U.S.C. § 1983, a statute of the United States being drawn into question involving Petitioners' federally protected U.S. constitutional rights accruing thereunder, including but not limited to the First Amendment; the Fifth Amendment as incorporated into the Fourteenth; the Due Process & Equal Protection of the Fourteenth Amendment; Article I, § 10 ; Article III § 2, and Article IV § 2 of the United States Constitution.

The Ohio Supreme Court denied on December 5, 2001, Petitioners' application for reconsideration of their Memorandum in Support of Jurisdiction and entered it in the Court's journal. The judgment order of the Ohio Supreme Court declining Petitioners' Memorandum in Support of Jurisdiction was entered on the Court's journal October 24, 2001. The Court of Appeals of Ohio, Eighth Appellate District decision affirming the Common Pleas Court's summary judgment in favor of the Respondents became final when it denied Petitioners' Motion for Reconsideration that was received for filing by its Clerk on June 27, 2001.

Petitioners deem it necessary to detail the arbitrary actions of the State as a jurisdictional predicate because Petitioners' 42 U.S.C § 1983 case is based upon their tort case against the State and its political subdivisions previously adjudicated against Petitioners for which "there is no federal interest save and except an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational". Martinez v. California, 444 U.S. 277, 62 L Ed2d 481 at 487, 100 S Ct 553 (1980), recognizes a discernible federal interest in protecting the individual citizen from state action that is wholly arbitrary or irrational by stating:

> "the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process

> Clause" and ".. the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational"

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) at pg. 79, states " "It has long been established that a state constitutional provision is a "statute" within the meaning of § 1257(2)" and "Appeal is thus the proper method of review."

Petitioners as Ohio and U.S. citizens contend that the adjudication by the Ohio Supreme Court in its syllabi 2 & 3 in the case of Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999), of legislation Am.Sub.H.B. No. 350, as having usurped the judicial authority of the State, brings Petitioners' 42 U.S.C. § 1983 case within the ambit of wholly arbitrary or irrational state action for which this Court has jurisdiction. Syllabus 2 states:

> "Am.Sub.H.B. No. 350 usurps judicial power in violation of the Ohio constitutional doctrine of separation of powers and, therefore, is unconstitutional."

Syllabus No. 3 states:

> "Am.Sub.H.B. No. 350 violates the one-subject provision of section 15(D), Article II of the Ohio Constitution, and is unconstitutional *in toto*."

Petitioners contend that this Court's jurisdiction is invoked by the arbitrary judicial action of the state legislator Respondents' mooting Petitioners' case against the State, by having usurped the judicial authority of the State in their enactment of Am.Sub.H.B. No. 350 in October 1996. This occurred at a time when Petitioners' wrongful death and

personal injury actions against the State and its political subdivisions were pending on Petitioners' Memorandum in Support of Jurisdiction in the Ohio Supreme Court.

In support of this Court's jurisdiction by State arbitrary judicial action Petitioners say, that the Respondents mooting of Petitioners case by the enactment of Am.Sub.H.B. No. 350 removed their statutory predicate that jurisdictionally qualified Petitioners' pending Memorandum in Support of Jurisdiction as issues of "public or great general interest" under the Ohio Supreme Court's authority to grant a discretionary appeal, delegated to it by Article IV, § 2(B)(2)(e) of the Ohio Constitution. It was arbitrary to Petitioners because of their Ohio constitutional right under that Article IV to an unfettered discretionary appeal opportunity as part of the Due Process afforded litigants in Ohio Courts by the State of Ohio when the State was a party to the litigation. Petitioners' case was statutorily protected from mooting by Respondents' ultra vires legislative acts by the operation of R.C. § 2743.02(A)(1) and by Article I § 10 of the U.S. Constitution. Petitioners case jurisdictionally qualified for a discretionary appeal and was winnable.

Respondents' removal of Petitioners' jurisdictional statutory predicate while the State was a party, "de facto", decided Petitioners' case arbitrarily. As such it is plainly a "judicial act" by Respondents. The Ohio Supreme Court, under Ohio Civ. R. 44.1(A)(1) & Civ. R. 1(A), is compelled to take judicial notice of the enactment, of Am.Sub.H.B. No. 350, with Petitioners case before it, regardless of the fact the bill was to have prospective application. The Court could only conclude under the presumptions of constitutionality and regularity, that Petitioners' statutory predicate was no longer law and did not qualify jurisdictionally as a case of public or great general interest. Thereafter the Court declined to take jurisdiction of Petitioners' case.

Am.Sub.H.B. No. 350's, tort reform, attempted to

overrule the judicial declarations of unconstitutionality by the Ohio Supreme Court in the First Tort Reform Act. Sheward, supra, at 86 Ohio St.3d page 492. Yet at the same time it made the State and its political subdivisions the beneficiary of having Petitioners' case unilaterally decided by Respondents'.

Those Respondents still serving as incumbents following the June 27, 2001 Court of Appeals decision in their favor in this case, revived and enacted in July 2001, in S.B. 108, all the statutes retrospectively relating back to immediately before their enactment of Am.Sub.H.B. No. 350 that had been knocked out as a result of the Sheward, decision supra. It mooted Petitioners' chance for an Ohio Supreme Court discretionary appeal of their §1983 case.

S.B. 108 represents a continuation of arbitrary State legislative conduct because approximately the same number of statutes are revived in S.B. 108 that have been found to have violated the one subject rule of Ohio's Constitution in the Sheward, case, supra, with respect to Am.Sub.H.B. No. 350. It is therefore a continuation of the usurpation of the judicial authority of the State. As such it is beyond legal challenge by Petitioners, as discussed in Sheward, supra.

Petitioners' contend they are protected from this arbitrary State action, by the U.S. Amendment XIV's. Due Process & Equal Protection. That they have both fundamental substantive and procedural constitutional rights to obtain redress from the Respondents in their individual capacity that have damaged them with their ultra vires legislative acts constituting State action; and from the State that has co-opted those acts in Petitioners § 1983 case.

The above co-opting State action involves, inter alia., a violation of the separation of powers doctrine by the State's failure to statutorily and judiciously adjudicate Petitioners § 1983 action against Respondents that is part and parcel of the arbitrary action under which this Court has

jurisdiction. The Attorney General violated the separation of power in representing Respondents' sued in their individual capacity after it was adjudicated that Respondents legislation was ultra vires. The Attorney Generals representation pursuant to Ohio State statute R.C. § 109.02 is repugnant to 42 U.S.C, § 1983. It is repugnant to this Courts decision in Hafer, supra, and the Due Process & Equal Equal Protection of the U.S. Fourteenth Amendment, once Sheward supra established that the legislation usurped the judicial authority of State. This, plus the judicial decisions and procedures in this case represent a substantial departure from the settled procedural and substantive law of the State in denying § 1983 relief to Petitioners after Petitioners had seasonably noted those departures and asserted the recognized law of the State. This makes it patent that the State has co-opted Respondents' ultra vires acts in violation of the separation of powers doctrine and have acted arbitrarily in this case..

R.C. § 109.02 is repugnant because it makes Petitioners' litigation of 42 U.S.C. § 1983 untenable in State Courts for the additional reason that any judgment obtained by Petitioners is hollow and voidable by being subject to Respondents well taken, but unstated implied Due Process defense that Respondents were denied the right to select their own counsel while being sued individually.

The Court's jurisdiction is invoked in protecting the individual citizen from state action that is wholly arbitrary or irrational by virtue of Respondents' nullification of the operation of Ohio State statute, R.C. § 2743.02 as being repugnant to Article I § 10 of the U.S. Constitution when Respondents' legislation usurped the State's judicial authority, mooting Petitioners' litigation thereunder.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Article I § 10 at Apdx. F, pg. 27;

Article IV § 2; at Apdx. F pg 28; Article III, § 2 at Apdx. F, pg 27; the First Amendment at Apdx. F. pg. 28; the Fifth as incorporated into the Fourteenth Amendment § 1, at Apdx. F. pg. 28; and the Fourteenth Amendment itself to the U.S. Constitution, Apdx.F pg. 29; Ohio State Constitution Article I, § 16, & Article IV § 2(B)(2)(e) at Apdx H pg. 29; and The Separation of Powers Doctrine.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983, at Apdx G pg. 33; Ohio R.C. § 2743.02(A)(1),. at Apdx I pg. 41; R.C § 2744.02(B)(3); & R.C. § 2744.03(E)(1), at Apdx I pg. 45; R.C. § 5535.15, § 5591.36 & § 5591.37, at Apdx I pg. 48; R.C § 109.02; Apdx I pg 25; Disciplinary Rules DR 7-107(A) & DR 7 107(B)(2) at Apdx. M pg 86; Am.Sub H.B. No. 350 at Apdx. J pg 51; S.B. 108, at Apdx. K pg. 75; Ohio. St.. Constitution Article IV § 2(B)(2)(e) & Ohio St. Constitution Article I § 16 at Apdx. H pg.35.

STATEMENT OF THE CASE

Petitioners sued the State in its Court of Claims for wrongful deaths and personal injuries they sustained in a one van, motor vehicle, guard rail accident on interstate highway I-70, on the basis that the guard rail constituted a nuisance. Summary judgments were granted to the State in Case No. 95AP 109-1164 and its political subdivisions in Case No. 95AP109-1169. Those case were affirmed on appeal. reported in Kniskern v Somerford Twp. 112 Ohio App.3d 189, 678 N.E.2d 273 (June 28, 1996). The Ohio Supreme Court declined jurisdiction to grant a discretionary appeal on December 20 1996, reported in 77 Ohio St.3d 1485 , 673 N.E.2d 145; and denied Petitioners' Motion for Reconsideration on January 29, 1997, reported in 77 Ohio

St.3d. 1549, 674 N.E.2d 1187. This Court, thereafter, also declined jurisdiction in case No. 96 – 1729.

After the Sheward decision supra, Petitioners filed this, their 42.U.S.C § 1983 case, in the Common Pleas Court of Cuyahoga County. The federal questions were raised in Petitioners' Complaint of 128 paragraphs that appears in the Apdx. O at pg 91. Petitioners raised additional federal questions by filing their Motion to Strike the Answers of the Attorney General, filed on behalf of the state legislator Respondents, sued in their individual capacity on the authority, inter alia., of Hafer v Melo, Jr., infra. Petitioners responded with legal arguments to Respondents' Motion for Summary judgment but moved the Court for leave of Court in order to obtain authenticated evidentiary materials lawfully necessary to negate a summary judgment motion.

Suddenly and unexpectedly, without notice or docket entries of reassignment, and contrary to the Court's own rules, a visiting judge granted summary judgment to Respondents and denied all of Petitioners' motions. Petitioners filed their objections to the visiting judge deciding the case and filed a notice of appeal. Those objections were renewed in Petitioners' Court of Appeals briefs and Petitioners' Assignment of Errors. The Court of Appeals found Petitioners' claims meritless; found that absolute immunity carried the day; did not address Petitioners' assignment of errors; affirmed the summary judgment; and remanded the case for the assessment of attorney fees sought by the Attorney General under a harassment statute repealed by the Sheward decision, supra, that was subsequently to be revived in July 2001; following the Appellate Court's June 27, 2001 denial of Petitioners' Motion for Reconsideration. (See S.B. 108 reviving 2323.51 at Apdx. K, pg. 76). Petitioners' Memorandum in Support of Jurisdiction to the Supreme Court of Ohio was denied, as was Petitioners' Motion for Reconsideration, wherein they

asserted that S.B. 108 was a continuing usurpation of the judicial authority of the State.

This case has a complex constitutional tort scenario requiring a rather detailed factual context to be understood.

The State of Ohio in 1970 acted through its Ohio Department of Transportation, (hereinafter ODOT), an agency of the State of Ohio, and built a bridge on Interstate Highway 70, at Deer Creek, with federal funds. ODOT installed as part of the bridge, a cement wing wall abutment, at right angles, ninety degrees perpendicular to the horizontal that formed a wash bank. It descended eight feet down to the creek 15 feet below. ODOT designed, attached and maintained the unsuitable guardrail to that bridge. The guardrail was unsuitable because it was built with a flawed guardrail design, known to ODOT at the time of construction, that permitted vehicle access to the wash bank and the creek below by the motoring public. It constituted a constructive nuisance at law in Petitioners' 1992 accident.

Ohio statutes provided for County liability for damages at the accident site guardrail that was caused by unsuitable guardrails at wash banks at County bridges, R.C. § 5591.36 & R.C. § 5591.37. ODOT entered Madison County and in 1970 built the accident site guardrail, using ODOT's own design drawings it had previously cancelled as obsolete, prior to the beginning of construction. ODOT ignored the safer standard construction design guardrail drawings it had adopted, that provided more curvature and setback, that made it impossible for the motoring public to access from I-70, the bridge's cement wing wall abutment, its wash bank, and the creek below. At the same time ODOT was constructing guardrails at an adjacent similar bridge on I-70, using these newly adopted standard drawings. ODOT from that day to this has retained sole control of the I-70 interstate highway.

This accident site guardrail was so unsuitable and

was a treacherous nuisance because it permitted vehicle access to the cement wash bank immediately behind the guard railing from I-70. Ohio statute R.C. § 2744.02(B)(3) delegated to its political subdivisions the duty to keep public roads, bridges or public grounds within the political subdivisions open, in repair, and free from nuisance attaching liability for injury, death or loss to persons for their failure to do so.

The fact that the guardrail permitted vehicle access to the cement wash bank immediately behind the guard railing from I-70 was one of the proximate causes of Petitioners' damages. Petitioners' driver, in 1992 traveling at 60 m.p.h., 88 feet a second, was able within three second from leaving the I-70 roadway to drive to and find the cement wingwall at the bridge in his sudden, unexpected loss of consciousness and/or sleep, and crash into the creek's far wash bank, leaving no skid marks.

Petitioners' suits against the State and the political subdivisions were dismissed by an adjudication of summary judgment in favor of the State and political subdivisions in the Court of Claims on the basis that the driver in which Petitioners were riding was the sole cause of the accident, notwithstanding that Petitioners' evidence had showed, that had the guardrail been built in accordance with ODOT's standard design drawings in place at the time of construction, as was an adjacent bridge guardrail, the vehicle in which Petitioners were riding would have been redirected back on to the highway rather than launched into and across the creek onto its far wash bank.

The State, which functions corporately, was liable to Petitioners on the legal doctrine of principal agent because it delegated to its political subdivisions, statutory liability for unsuitable guardrails and maintaining a nuisance on public roadways. ODOT retained control of I-70 and the political subdivisions did no maintenance or fixing of it other than to

exercise their police power on the highway.

The adjudication was arbitrary because the summary judgment was granted in favor of the government with no showing that the driver was either intentional or negligent in his sudden, unexpected loss of consciousness, other than his speculative statement guess that he must have suddenly and unexpectedly fallen asleep at the wheel during that short period of time, when such a statement is not subject to memory. It was also arbitrary because the Ohio Supreme Court had held the question of whether the guardrail constituted a nuisance and was close enough to the highway to impose a duty under the statute are fact questions. See Adkins v Village of Ontario, 8 Ohio St.3d 45, 457 N.E.2d 317 at pages 319-320 (1983)

It became arbitrary by the Court of Appeals' affirming the Court of Claims' judgment, by continuing to apply the State's judicially created case law of liability that stems from the State's sovereign immunity exception created by the judiciary prior to the establishment of the Court of Claims in 1975. This case law limited the State's liability to accidents occurring only upon the highway, itself. It rejected the settled principal agent law principles that are supposed to operate as the controlling rule of law applicable to suits between private parties pursuant to. R.C. § 2743.02(A)(1).

The law applicable to private parties is premised on the notion that each person is liable for his, her, or its own torts. This legal doctrine plainly makes the State, a principal, liable for the acts of its political subdivisions agents, to whom it delegates duties, that the State otherwise would ordinarily be liable for, when those agents by omission or commission, negligently carry out those duties. However, because the State has reserved its sovereign immunity as to its political subdivisions the sovereign those sovereign immunity cases strictly construing their liability

because they are an exception to the common law has allowed the law of those cases to be adjudicative. Petitioners original case against the political subdivisions was filed in the Common Pleas Court of Cuyahoga County and by the State's special venue statute removed to the Court of Claims to be adjudicated with Petitioners' case against the State. The Courts below then arbitrarily applied the law applicable to the political subdivisions to Petitioners' case against the State.

Ohio statute R.C. § 2744.02(B)(3), delegated to its political subdivisions the duty to keep public roads, bridges or public grounds within the political subdivisions open, in repair, and free from nuisance attaching liability for injury, death or loss to persons for their failure to do so. How could a State under the rule of law applicable to suits between private parties not be liable, as a matter of law, so as to warrant a summary judgment in its favor?

These issues were covertly intertwined in Petitioners' case. The Respondents avoided this confrontation and patent liability, by legislation that usurped the judicial authority of the State. Petitioners have no legal standing to challenge it, or otherwise overcome the presumptions of constitutionality and regularity that their legislation is imbued with, by law. They mooted Petitioners case by legislatively removing Petitioners' statutory predicate that jurisdictionally qualified their Memorandum in Support of Jurisdiction for a discretionary appeal.

Petitioners' §1983 case, in Count I of their complaint, sued Respondent legislators, in their individual capacity, in the State Common Pleas Court for money damages under 42 U.S.C. § 1983, for Respondents' unconstitutional acts and ultra vires, judicial acts stemming from their enactment of the tort reform act, Am.Sub.H.B. No. 350. That bill mooted Petitioners' legal right to seek reversal of their cases pending before the Supreme Court of

Ohio on Petitioners' Memorandum in Support of Jurisdiction for a discretionary appeal. Their cases were otherwise winning and meritorious wrongful deaths and personal injury actions against the State and its political subdivisions. It deprived Petitioners of their rights to a meaningful hearing at a meaningful time under the Due Process and Equal Protection clauses of the 14th Amendment of the U.S. Constitution.

Petitioners alleged in Count II of the complaint, paragraph 117 et seq., in substance, after incorporating the allegation in Count I as though fully rewritten, that Respondents were lobbied by party defendants John Does I, whose principals were John Does II. John Does III are those persons that funded John Does I and John Does II. Each are named as party defendants in the caption with identities and addresses unknown to Petitioners.

They are alleged to have acted in concert with Respondents knowing that when they lobbied the Respondents, that there was a reasonable legal probability that the legislation would subsequently be held, as a matter of law, to be unconstitutional. It was further alleged, that but for, the successful lobbying efforts of John Does I, II and II, the Respondents would not have enacted Am.Sub.H.B. No. 350. That then Petitioners would have received the due process type of hearing on their Memorandum in Support of Jurisdiction from the Supreme Court of Ohio that they were otherwise entitled to.

Petitioners sued the lobbyists and their principals that had lobbied for the legislation usurping judicial authority, as being jointly and severally liable with the Respondents for Petitioners' damages. Petitioners' legal theory is that while the U.S. Constitution protects Respondent Lobbyists' right to petition their government, it does not protect them, when they have either sought or obtained legislation that usurps judicial authority of the State.

The fact is that after Sheward (1999), supra, decision, the Respondents did not, forthwith, enact any remedial legislation, notwithstanding that this decision divested the State of some of its police power previously delegated to municipalities of the authority to maintain streets and roadways free from nuisance. Circumstantially it creates the inference that the lobbyists had engaged in "no fault lobbying" where the lobbyists obtain their legislative goals win or lose, by making a deal with the state Respondents by agreeing not to remediate the lobbied for legislation, if it in fact fails to pass constitutional muster. The judicial authority of the State has remained usurped and still remains usurped from October 1996 to the present time. S.B.108 enacted in July 2001, to restore the status quo, only serves to continue the usurpation because it violates the one subject rule of the Ohio Constitution by its nexus to Am.Sub.H.B.No.350.

The State's Attorney General entered a general appearance in Petitioners' § 1983 case by filing answers on behalf of the state Respondents that were sued in their individual capacity. The answers admitted that Respondents had acted under color of law with respect to Petitioners' allegations. Those answers were filed without first filing a motion to intervene as required by the Ohio Rules of Civil Procedure 24. Petitioners' filed a Motion to Strike the answers the Attorney General had filed on behalf of the Respondents, relying on the authority of Hafer v. Melo, Jr., supra, for the legal authority that the State treasury is not to be used for the defense of senior officers of the state sued in their individual capacity. This issue remained undecided, until the Court granted the Attorney General's Motion for Summary Judgment in which all of Petitioners' Motions were denied. Petitioners had responded to the Summary Judgment with a brief on the law, but at the same time moved for leave to obtain the supporting documents in

affidavit form as required by law to rebut the Motion for Summary Judgment in the event their partial legal response was insufficient to defeat that Motion. The Summary Judgment was granted in favor of Respondents. Petitioner Motion for Leave was denied. Petitioners' interrogatories served with the complaint seeking the identities of John Does I, II and II, remained unanswered. The Attorney General Attorney objected to answering those interrogatories. Petitioners' citation of controlling federal authorities evidencing that the objections were not well taken did not convince the Court.

Petitioners' complaint filed in State Court was subject to removal to federal court by any of the named party defendants. It is therefore an extremely detailed pleading because the federal Sixth Circuit Court of Appeals requires it in a § 1983 case. All of the 128 paragraphs of allegations are in the appendix starting at Apdx. O pg. 91. Omitted therefrom are Exhibit A and B attached to the complaint.

Exhibit A is a proposed bill that was drafted by the Ohio Legislative Service at the request of Diane Grendell, State Representative in the District where Petitioner James Kniskern resides. That was to be introduced in the General Assembly with a predicate that formed the underpinnings of Petitioners moral claim their counsel was pursuing. Counsel was unsuccessful in getting it introduced to the General Assembly. Exhibit B is Petitioners' Petition for a Writ of Certiorari docketed in this Court as Case No. 96-1729, on May 1, 1997, seeking this Court's review the Petitioners' wrongful death and personal injury cases against the State and its political subdivisions that was mooted by Am.Sub.H.B. No 350.

Petitioners incorporate by reference their Complaint as a further Statement of the Case as it appears in Appendix O. Inasmuch as Petitioners' Statement Of Jurisdiction, supra, contains Statement of the Case material, Petitioners

incorporate it by reference as further Statement of the Case.

Petitioners' Assignment of Errors and the collateral issues filed in the Eight Appellate District are in Apdx. P & Q starting at pg.129. They along with the Complaint and Petitioners' Motion for Reconsideration In the Supreme Court of Ohio, (Apdx R pg. 141), demonstrate that Petitioners issues are duly seasonable and appropriately raised below.

The State Judiciary prohibits Petitioners in its disciplinary rules, the right to discuss the legal and factual issues with the media, while pursuing their § 1983 case in the State Courts. In Bogan v. Scott-Harris, 523 U.S. 44 (1998), this Court in granting absolute legislative immunity to local legislators, stated that no actionable legal remedy was available against those legislators, but that those aggrieved, had the right to vote the legislators out of office.

Petitioners contended in the Court of Appeals that Bogan, supra, was a "speaking remedy" protected by the First Amendment to the U.S. Constitution. It was a "speaking remedy" because legislators cannot be voted out of office without disclosing and speaking your legal and/or political grievances against them. The voidable, summary judgment opinion in favor of Respondents, was rendered by the visiting judge's, acting outside the adjudicating authority of the Common Pleas Court's Local Rule 15(B). The Court of Appeals sustained this transfer of the case to a visiting judge over Petitioners' timely objections made in accordance with the Court's, controlling and settled case law, cited by Petitioners, that makes such a decision voidable. See Berger v Berger 3 Ohio App.3d 125, 443 N.E.2d 1375 (1981).

The voidable summary judgment opinion took umbrage with Petitioners' Complaint stating :

> 'The claims and faulty legal reasoning spread upon volumes of paper pages filed by Plaintiffs in this case come as close to "frivolous" as one can imagine. The

> complaint itself (49 pages plus 52 pages of exhibits violates Civ. 8 and could be subject to an order striking it from the file. It will be remembered for its prolixity, not for its substance."

See Complaint in Apdx. O pg. 91.

It is contended that this judge's voidable opinion placed the factual information contained in the allegations in Petitioners' complaint in a false light and in a cloud of doubt, as to whether the statements and averments would qualify or constitute, "information contained in a public record ", pursuant to DR 7 107(B)(2), as an exception to DR 7-107(A). It placed a restraint on Petitioners' right to speak, in that Petitioners were otherwise prohibited by Disciplinary Rules DR 7-107(A), during court litigation, from going to the media with the issues of the case. The Court of Appeals ignored this issue raised by Petitioners and made no accommodation so as to comply with Bogan, supra, and further restrained Petitioners' right to speak by remanding the case for attorney fees sought below, notwithstanding that Petitioners had made that Court aware, that the statutory predicate, R.C. § 2323.51, for those attorney fees that the Attorney General had filed for, had been repealed by the Sheward decision, supra. S.B. 108 revives R.C. § 2323.51. Apdx. K pg. 76.

The Courts below deprived Petitioners of their speaking remedy, authorized in Bogan, supra, in the litigation of their § 1983 action and protected under the First Amendment of the U.S. Constitution. The remand for attorney fees under a repealed statute deprived Petitioners of their U.S. First Amendment right to petition their government and denied them the Equal Protection of the law under the Fourteenth Amendment to the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

It is of national importance for this Court to adjudicate the questions of first impressions presented in this 42. U.S.C. § 1983, case against the Respondent state legislators, sued in their individual capacity, where the judicial authority of the State has been adjudicated as having been usurped by the Am.Sub.H.B. No. 350, legislation Respondents enacted in 1996. The State's judicial authority continues to be usurped by incumbent Respondents' tardy, remedial, reviving legislation, S.B. 108, enacted in July 2001, which is in violation of the same one subject rule it was intended to remedy. This legislation is causing, and will continue to cause into the indefinite future, irreparable harm and damage to the State's judicial system and those served by the State tort law. No adequate, adjudicated remedy at law or equity presently exists.

Petitioners' case presents the issue, inter alia., as to whether Respondents' legislative mooting by ultra vires usurpation of the State's judicial authority, ripens into a "judicial act" and subjects them to a 42 U.S.C. § 1983 liability in their individual capacity, for violating Petitioners' rights under the Separation of Powers Doctrine, the U.S. 14th Due Process, and Equal Protection clauses, and Article I § 10 of the U.S. Constitution, where the State is a party to the proceedings and statutorily committed to have its liability adjudicated in accordance with the rule of law applicable to suits between private parties. Conceivably it may be a taking of private property for public use, without compensation by Amendment V incorporated into the 14th.

As a matter of State law, an ordinary citizen does not have legal standing to challenge ultra vires legislative acts that usurp the judicial authority of the State. See Sheward opinion, supra. The vested legal rights of persons changed by that legislation are irreparably damaged by such ultra

vires legislative acts, for which they have no adequate remedy at law or equity. Justice Black in his concurring opinion in Tenney v Brandhove 341 U.S. 367 at pg. 379 (1951) confirming the Court's holding in that case stated:

> "The Court's opinion also points out that Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377, held legislative immunity to have some limits. And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act."

Am.Sub.H.B. No. 350 has been adjudicated to usurp the judicial authority of the State. This is that point at which the Respondent legislators' conduct so far exceeds the bounds of legislative power that they may be held personally liable in a suit brought under the Civil Rights Act. This Court has yet to decide this issue in a factual context where the State Court adjudicates legislation to be a usurpation of the State's judicial power.

A Writ of Certiorari should issue to settle this issue of first impression as to whether the Respondents' enactment of legislation that is adjudicated to usurp the judicial authority of the State, is an act within the legitimate sphere of Respondents' legislative duties, as a matter of law? The case of Doe v. McMillan (1972) 412 U.S. 306 at pg. 319, 93 S. Ct. 2018 at pg. 2028, 36 L.Ed2d 912 states:

> .....The scope of immunity has always been tied to the scope of ... authority' Wheeldin v. Wheeler, 373 U.S. 647, 651, 83 S. Ct. 1441, 10 L.Ed2d 605 (1963). In the legislative context, for instance, '(t)his Court has not hesitated to sustain the rights of private individuals when it found Congress

> was acting outside its legislative role' Tenney v. Brandhove, supra, at 377 of 341 U.S., at 788 of 71 S.Ct. Thus we have recognized 'the immunity of legislators for acts within the legislative role,' Pierson v. Ray, supra, 386 U.S., at 554, 87 S.Ct., at 1218, but have carefully confined immunity to protect only acts within the 'sphere of legitimate legislative activity.' Tenney v. Brandhove, supra, 341 U.S., at 376, 71 S.Ct. at 788; cf. Powell v. McCormack, supra.

Petitioners contend that the summary judgment granted Respondents below is wrongfully decided as a matter of law. It sets a legal precedent that is disastrous to our legal system. Once a court declares legislation to have usurped the judicial authority of the state, the legislators that enacted that legislation are deemed at law to have committed an ultra vires act for which they are personally liable to those damaged by it in a § 1983 action. They are and should be judicially estopped from denying it by legal counsel of their own choice, other than the Attorney General.

Incumbent Respondents' remedial, reviving legislation, S.B. 108, with its nexus to Am.Sub.H.B. No. 350, prima facie, is a continuation of the usurpation it purports to correct. This is because it inherently contravenes the one subject rule of the Ohio Constitution that Sheward found to be applicable to Am.Sub.H.B. No. 350. This legislation is a direct attack on the citadel of Marbury v. Madison, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803), for the purpose of establishing the legislature as the final arbiter of the law.

The State's Chief Justice in a concurring opinion stated: "This case presents a perfect example of the chaos resulting from Sheward". See Stevens v Ackman et al. 91 Ohio St.3d 182 at pg. 196, 743 N.E.2d. 901 at pg. 912

(2001). His statement makes it plain that State's judicial system has been adversely affected, notwithstanding the Court's attempt to navigate the treacherous waters the Respondents' ultra vires acts caused. Three months following the Stevens decision, supra, S.B. 108 was enacted, coincidentally after the Court of Appeals had rendered its decision in the case sub judice.

The over arching arbitrary power of the State to invoke ultra vires legislation with impunity, to suit its convenience, subverts its obligation to submit to suit by claimants in the State's legislatively created Court of Claims, pursuant to the Ohio Constitution's Bill of Rights, Article I § 16. This is patent in Petitioners' Court of Claims case, the subject of this § 1983 action, whereby the legislative usurpation of the judicial power of the State was used as a mooting tool, for the purpose of denying Petitioners an opportunity for a discretionary appeal to the Ohio Supreme Court, by nullifying their statutory predicate that Petitioners were relying upon jurisdictionally. The mooted statutes deprived the Ohio Supreme Court of its jurisdiction to grant Petitioners a discretionary appeal under the Ohio Constitution Article IV § 2(B)(2)(e), by removing Petitioners' otherwise jurisdictionally qualifying issues, as issues of public importance or great general interest, necessary for a discretionary appeal.

That arbitrary power was sufficient to deprive the Ohio Supreme Court of its constitutional jurisdiction to grant Petitioners a discretionary appeal and sustain summary judgments in favor of the State and its political subdivisions, when the law of the State holds that guardrail accidents are issues of fact. See Adkins v Village of Ontario, supra. Even if the Court had taken jurisdiction, it would have to dismiss Petitioners' case as having been improvidently granted for lack of jurisdiction, after Petitioners' issues were mooted.

That arbitrary power is and was coupled with the

State's denial to Petitioners of the legal right of standing to challenge Respondents usurpation of the judicial power of the State in its Courts, that stems from their ultra vires legislative acts. This denial of standing was operative both under State law in Petitioners' original tort action against the State, and Petitioners' § 1983 federal law action against the Respondents also litigated in the State Courts.

That arbitrary power denies Petitioners of their fundamental substantive and procedural rights under Ohio's Constitution, Article I § 16, and the State enabling statutes, as well as the fundamental substantive and procedural rights under U.S. Constitution's 14th Amendment, Due Process & Equal Protection clauses, Article I § 10, and the Separation of Powers doctrine.

The State's over arching arbitrary power violates the rules of fundamental fairness. Ohio's Constitution Bill of Rights, Article I § 16, authorizes suits against the State by those it serves. The State statutorily has consented to be sued and has statutorily agreed to adjudicate Petitioners' case against the State filed in the Court of Claims in accordance with the rule of law applicable to suits between private parties.

The State's retention and use of the power to alter the applicable statutes by which it may be found liable, by ultra vires means, and apply case law decided in the context of State sovereignty, to an adjudication of Petitioners' case against the State, is not only contrary to Ohio's Constitution and its enabling statutes, but is beyond adjectival dimension and has created and will continue to create constitutional torts of great magnitude.

This case not only raises important issues concerning the rights of individuals and the power of State legislatures, it implicitly presents the issue of the restoration of the judicial integrity of the Ohio Supreme Court as being the final arbiter of the law of Ohio. That Court is being

confronted with the continued usurpation of its judicial authority by the incumbent Respondents' enactment of S.B. 108's remedial, reviving legislation, enacted in July 2001. Its avowed purpose is to revive the statutory status quo existing prior to Am.Sub.H.B. No. 350, having been declared unconstitutional *in toto, inter alia.*, by violating the Ohio Constitution's one subject rule. It is a continuation of that usurpation of judicial authority because it revived about the same number of statutes in S.B. 108, that were initially declared unconstitutional *in toto,* in Sheward, supra. S.B. 108's nexus to Am.Sub.H.B. No. 350 as remedial, reviving legislation is plain. S.B. 108 defies the Court's original adjudication that Am.Sub.H.B. No. 350. It violates the one subject rule of Ohio's Constitution.

Sheward, supra, itself, requires special standing to attack ultra vires legislation for usurpation of judicial authority for which Petitioners are legally disqualified. Thus the Ohio Supreme Court is and was prohibited from considering in Petitioners' Motion for Reconsideration § 1983, legal argument for a discretionary appeal, that S.B. 108 unconstitutionally mooted Petitioners' case by continuing to usurp the State's judicial authority and constituted ultra vires legislation.

Petitioners right to make that challenge is a fundamental, substantive, and procedural Due Process & Equal Protection right under U.S. § 1, 14th Amendment that should have been validated and recognized by the Ohio Supreme Court in Petitioners' § 1983 case, notwithstanding that ultra vires acts by State officers are statutorily and judicially actionable only in quo warranto by the Attorney General. The presumption of regularity presumes, that the Court will protect its judicial integrity at its first opportunity but could not because of Petitioners' lack of legal standing. .

It is of national importance for this Court to settle the issue of whether the unknown party Respondent, Lobbyists

and their Principals may be held liable by Petitioners in their § 1983 case as joint tortfeasors. These unknown party Respondents may have procured or sought this legislation that usurps the judicial authority of the State, and/or engaged in "no fault lobbying" by obtaining a "no fault" commitment from the state legislator Respondents not to remediate the legislation if it failed to pass constitutional muster, notwithstanding the Lobbyists' and their Principals' have First Amendment rights to petition their government.

This constitutional issue is a matter of first impression and impacts upon the constitutional issue of money as speech, which has contributed to suborning the integrity of our government. It is present as an issue of national importance to be decided in this case when the Attorney General declined to answer Petitioners' interrogatories seeking the identities of unknown, party defendants, John Does I, II, and III. It is additionally significant as an issue to be decided by this Court because the State was unconstitutionally, partially divested of its police power delegated to its municipalities in R.C. § 723.01 immediately following the Sheward decision, supra. If Petitioners' contentions are correct about S.B. 108, that police power is still unconstitutionally divested.

Respectfully, the lack of clear judicial authority on the subject matter of this suit from this Court has placed in doubt, as to what branch of government is the final arbiter of the law. That doubt has thus far forestalled resolution of Petitioners' case by the appropriate legal application of judicial estoppel, and the Courts' below use of their inherent judicial contempt power, necessary not only to vindicate the usurpation of the state's judicial authority, but also Petitioners' 42 U.S.C. § 1983 case as well.

Petitioners and the State have been damaged by Respondents' ultra vires legislative actions. The unknown Respondents,' John Doe's I, II & III may be complicit with

Respondents. Nowhere is there any attempt or gesture by the Attorney General to recover those damages by exercising the State's corporate right of indemnification from the Respondents, its agents, and those that may have acted in concert with them, as the unidentified Respondent Lobbyists and their Principals. Does not the State judiciary, as part of Petitioners' § 1983 case, when remedial legislation is not enacted forthwith, suggesting "no fault lobbying", have the duty to invoke its contempt power to vindicate the Court's authority and recover the damages from those causing the degradation of the Court's authority?

Usurpation of the judicial power of the State by legislation is a serious State corporate mischief requiring immediate repair because no adequate remedy at law for the State or for the Petitioners presently exists, unless this Court makes one. Significant unresolved 42 U.S.C. § 1983, state statutory and judicial issues emanating therefrom, and presented in this case, are of public importance and great general interest of the highest order, and are yet to be addressed or settled by this Court.

The Appellate Court's decision has place the Respondents back into the sphere of legitimate legislative activity. That Court treats ultra vires legislative acts the same as if they were unconstitutional legislative acts. That legal position moots the issue of delegated constitutional authority by which State government is premised upon. When that goes, we no longer have a government of laws but a government of persons, who with their immunity cannot be held accountable.

The State's right to legislate is limited by constitutional limitations. Munn v. People of Illinois, 94 US 113, 24 L Ed 77 (1877) states at p. 87:

> "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself,

> as a rule of conduct, may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations."

That whim does not lawfully extend of the usurpation of judicial authority of the State or to a continuation thereof.

Petitioners' were wrongfully deprived of their vested property right in their wrongful deaths and personal injury actions against the State by the ultra vires legislative actions of the Respondents. Martinez v. California, 444 U.S. 277, at pgs. 281-282 (1980) and Logan v. Zimmerman Brush Company, 455 U.S. 422 at pg. 429 FN4, (1982). Thus far, Petitioners have been unable to redeem the vested rights they have been deprived of either against the State or Respondents

Respectfully, this Honorable Court should grant Petitioners a writ of certiorari, because the State in adjudicating Petitioners' § 1983 case has co-opted the Respondents' ultra vires act of usurping the judicial power of the State. The State co-opted by aligning itself with the unknown party defendants, Respondents John Does I, II, and III; by the Attorney General appearing on behalf of the State in defense of the Respondents' adjudicated ultra vires act in Sheward as if their ultra vires act is an authorized act of the State; by having its Courts condone Respondents ultra vires act as a legitimate legislative act to which absolute immunity is a complete defense entitling Respondents to summary judgment in their favor; and by judicially departing from settled federal law in adjudicating Petitioners' § 1983 attempt to vindicate their civil rights in this action, contrary to the Supremacy clause of the U.S. Constitution when the State judiciary are sitting as federal judges in that adjudication.

Petitioners plainly sued Respondents in their individual capacity following the Sheward decision, supra.

See the caption in the complaint in Apdx. O at pg. 91. The Attorney General appeared generally on behalf of the State by filing Respondents' answers to Petitioners' complaint, without filing a motion to intervene, as required by Ohio Civil Rule 24. Nor did the Attorney General reserve the state's sovereignty in the answers filed on behalf of Respondents in the Common Pleas Court. Petitioners lost these issues in the Courts below.

When Respondents are sued in their individual capacity for their adjudicated ultra vires acts in a § 1983 action and they are defended by the Attorney General with a general appearance on behalf of the State, the issue of national significance arises and is presented in this case, as to whether the State under these circumstances has become a party to Petitioners' 42 U.S.C. § 1983 case and subject to its liability, by waiver or otherwise, though a state, thus far, is not a person under § 1983 as a matter of law?

The State in this litigation has successfully nullified, Petitioners' First Amendment "speaking remedy" to vote the Respondents out of office as authorized by this Court in Bogan v. Scott Harris, 523 U.S. 44 (1998). It was condoned by the Court of Appeals. Petitioners deserve a writ for certiorari on this issue because the voidable summary judgment opinion effectively silenced Petitioners and their counsel at a relevant time when they were entitled to and needed the speaking remedy authorized by this Court to alert the citizenry.

The Sheward Court found its judicial authority usurped by legislation. In Petitioners case against this ultra vires legislative power, the same judiciary followed an apparent policy of condonation by ignoring the usurping of its judicial power asserted in Petitioners' argument in their Motion for Reconsideration, Apdx R pg. 140, that S.B.108 constitutes a continuation of the usurpation of the judicial power the State.

The Attorney General's statutory duty to defend Respondents, sued in their individual capacity arises under R.C. § 109.02. It requires any state officer sued in a civil case to be represented exclusively by the Attorney General. This statute has been amended since this Court's 1991 decision in Hafer v. Melo, Jr., 502 U.S. 21, supra. The Respondents' omission to create an exception for those senior officers sued in their individual capacity is really another usurpation of the judicial authority of this Court.

Hafer, supra, authorizes § 1983 suits against state officers sued in their individual capacity with the proviso that no state treasury money shall be used. With the State's Attorney General statutorily compelled to defend Respondents, State money is necessarily used for their defense, contrary to Hafer, supra. Secondly, any judgment Petitioners may obtain against the individual Respondents is subject to the defense, that Respondents were deprived of their Due Process constitutional right to select their own counsel, making any judgment against them voidable.

Petitioners' initial motion to strike the answers of the Attorney General based upon Hafer v. Melo, Jr., supra, was denied by the Common Pleas Court. It was raised as an assignment of error in the Court of Appeals but unaddressed in the Court's opinion, contrary to its regular procedure. Respectfully, that Court's financial dependence on the General Assembly for funding disqualifies it as a neutral adjudicator in a case such as this. Only this Court is sufficiently financially independent to dispense Due Process to Petitioners, should their case qualify for a writ.

The Respondents usurped the judicial authority of the State in October of 1996. by their enactment of Am.Sub.H.B. No. 350. The Ohio Supreme Court, in August of 1999 decided it in Sheward, supra. The judicial authority remained usurped without remedial legislation until July 2001 when S.B. 108 was enacted. S.B. 108's remedial,

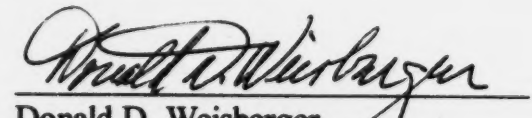
revival legislation in one bill, because of its nexus to Am.Sub.H.B. No. 350, which it is intended to remedy, plainly continues the original usurpation of the judicial authority, by violating of the one subject rule of the Ohio Constitution adjudicated in Sheward, supra. It is not unreasonable to conclude that S.B. 108, at a minimum, places a serious cloud over those that are to be governed by the rule of law. When the one subject rule can be so easily managed legislatively by a series of small enactments, the appearance of S.B. 108 suggests a purposeful act that ratifies the facially masked original intent to usurp that resulted in Sheward, supra.

Without this Court's intervention by granting a writ of certiorari, the State is permitting, and will continue to permit into the indefinite future, the tort law of the State to be controlled by the usurpation of judicial power, denying not only Petitioners, but all Ohio litigants, Due Process and Equal Protection of the law under the 14th Amendment to the U. S. Constitution.

CONCLUSION

Respectfully, Petitioners therefore pray that their petition for writ of certiorari be granted.

Dated this 4th day of March, 2002.

By: 

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

JAMES KNISKERN, et al.,
Petitioners,

v.

RON AMSTUTZ, et al.,
Respondents.

On Petition for Writ of Certiorari
To the Ohio Supreme Court & Ohio Court of Appeals,
Eighth Appellate District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Vol. I of IV
Pages 1-37, A-H

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Court of Appeals of Ohio, Eighth District
County of Cuyahoga
NO. 78407

JAMES KNISKERN, ET AL.,:		
Plaintiffs-Appellants	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
RON AMSTUTZ, ET AL.,	:	
Defendants-Appellees	:	

DATE OF ANNOUNCEMENT:
OF DECISION : JUNE 7, 2001

CHARACTER OF PROCEEDING: Civil appeal from
Common Pleas Court
Case No. 401459

JUDGMENT : AFFIRMED AND REMANDED

DATE OF JOURNALIZATION : _____

APPEARANCES:

For plaintiffs-appellants: Donald Weisberger
3391 Superior Pk. Dr.
Cleveland Heights Ohio 44118

For defendants-appellees: Betty D. Montgomery, Esq
Attorney General of Ohio
BY: Judith L. French, Esq.
Elizabeth Luper Schuster, Esq
30 E. Broad St. 17th Floor
Columbus, Ohio 43215

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MICHAEL J. CORRIGAN, j.:

This is an appeal from the grant of summary judgment entered by the trial court on appellants complaint filed in the Cuyahoga County Court of Common Pleas against seventy-two (72) legislators who voted on September 26, 1996 for the passage of Am.Sub.H.B. No.350, commonly known as the "tort reform" legislation. Because we find that the causes of action contained in appellants' complaint are wholly without merit and that the appellees enjoy absolute immunity for asserted causes of action arising out of their legislative duty, we affirm the ruling of the trial court.

Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come but to one conclusion and viewing such evidence most strongly in favor of the party whom the motion for summary judgment is made, that conclusion is adverse to that party. Norris v Ohio Std. Oil Co. (1982), 70 Ohio App.2d 1; Temple v Wean United, Inc.(1977), 50 Ohio St.2d 317.

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The appellants' complaint vaguely purports to be brought under the auspices of 42 U.S.C. § 1983, and thus the alleges that the conduct complained of deprived the appellants of rights, privileges or immunities secured by the Constitution or laws of the United States. The United States

Supreme Court has repeatedly held that legislators enjoy absolute immunity from suits brought under 42 U.S.C. § 1983 for actions within the sphere of legislative activity. Bogan v. Scott-Harris (1998), 523 U.S. 44, 49 118 S.Ct. 996, 970.

In Tenney v. Brandhove (1951, 341 U.S. 367, 71 S.Ct 783, the Court stated that:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in Arizona v California, 283 U.S. 423, 455.

Ohio courts have also long recognized that when a legislator votes on a proposed bill or ordinance, he is

performing a

quintessential legislative function and thus enjoys absolute immunity arising out of the casting of that vote. Additionally Article II, Section 12 of the Ohio Constitution, which is nearly identical to Article I Section 6 of the United States Constitution states:

> Senators and representatives, during the session of the general assembly shall be privileged from arrest *** and for any speech, or debate, in either house, they shall not be questioned elsewhere.

In Hicksville v. Blakeslee (1921), 103 Ohio St. 508, 517-518 the Ohio Supreme Court stated:

> That the legislative officers are not liable personally for their legislative acts is so elementary, so fundamentally sound, and has been universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared.
>
> ***
>
> The exercise of discretion by a village councilman in voting for a resolution or ordinance void by reason of statutory limitation upon the power of council is no different from the exercise of discretion be a member of the general assembly in voting for a statute void by reason of a constitutional limitation upon the power of

> the general assembly, yet no one would claim that a legislator would be liable either in his official or in his individual capacity for the exercise of judgment and discretion in voting for such void statute. (Emphasis added)

It should be obvious to any reasonable person that the trial court correctly determined that the appellees were acting in their

legislative capacities, rather than their individual capacities, when they voted in favor of the passage of the tort reform legislation. Appellants' counsel evidences a fundamental misapprehension of existing law in the realm of legislative immunity by filing a lawsuit wherein it is alleged that individual legislators may be held personally liable for voting for passage of a statute that is later held unconstitutional.

The appellants theorize that the appellees are not immune from personal liability arising out of their vote in favor of the tort reform legislation because they acted in a "judicial" manner when they tried to usurp the prerogative of the judiciary by legislating in the area of tort reform. According to the appellants' logic, the immunity from suit of the individual legislators was usurped when the Supreme Court decided State ex rel. O.A.T.L v Sheward (1999), 86 Ohio St3d. 451, wherein a majority of four justices held that the tort reform legislation was unconstitutional in toto. There is absolutely no support for this assertion to be found with the test of the Court's decision in Sheward or elsewhere. If

legislative immunity were to be conditioned upon favorable review of legislation in the courts, the doctrine would be rendered meaningless and both the legislature and judiciary would

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become increasingly politicized. For these very reasons, amongst others, there has never been a serious suggestion that the immunity from suit afforded to legislators be modified in the manner suggested by the appellants.

The appellants also assert in this appeal that they were denied due process of law when their case was "transferred" from the docket of the trial judge to whom it was originally assigned to a retired judge sitting by assignment. The appellants counsel actually claims that he should have been given an opportunity to "voir dire" the second judge to ascertain whether or not he is neutral and impartial. Initially, we note that there is no evidence in the record that this case was ever transferred from the docket of the judge to whom it was assigned. It is not uncommon for visiting judges to be assigned to manage the docket of the trial judge who anticipates being absent for an extended period due to illness or some other factor(s). If the appellants had a problem with the judge who ruled on the motions in this case, their remedy was to file an affidavit of prejudice with the Supreme Court. Having failed to have done so, and having failed to present even a scintilla of evidence of bias to this court, the appellant will not be heard in the instant appeal to complain of bias or prejudice.

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Far from being " a difficult case of first impression," as suggested by the appellants in their brief filed with this court, this case presents no serious legal issues or questions of fact. As the trial court aptly noted:

> *** Plaintiffs are simply attempting to fix responsibility for damages on the legislator-defendants by asserting an irresponsible, legally untenable theory of speculation as to what the Supreme Court may have considered in denying their discretionary appeal.
>
> The claims and faulty legal reasoning spread upon the volumes of paper pages filed by Plaintiffs in this case come as close to "frivolous" as one can imagine. It will be remembered for its proxlixity, not for its substance.

Accordingly, each of the appellants' assignments of error is overruled and the judgment of the trial court is affirmed in its entirety. This case is remanded to the trial court for the purpose of ruling on the pending motion for attorney fees and expenses filed by the appellees.

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This cause is affirmed and remanded for proceedings consisitent with this opinion.

It is ordered that appellees recover of appellants

herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Signed Michael J. Corrigan
MICHAEL J. CORRIGAN
JAMES D. SWEENY, P.J. and
ANN DYKE, J., CONCUR

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B0, 22(D) AND 26(A)
RECEIVED
JUNE 07 2001
GERALD E. FUERST
CLERK OF COURT OF APPEALS
BY_____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by

the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX B

Court of Appeals of Ohio, Eighth District
County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

JAMES KNISKERN, ET AL
Appellant

COA NO. 78407 LOWER COURT NO. CP CV-401459

COMMON PLEAS COURT

-vs-

RON AMSTUTZ, ET AL
Appellee

MOTION NO. 29005

Date 6/27/2001

Journal Entry

MOTION BY APPELLANT FOR RECONSIDERATION IS DENIED

RECEIVED FOR FILING
JUNE 27 2001
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY (SIGNED) AL U DEP.

Presiding Judge James D. Sweeny, Concurs
Judge Ann Dyke, Concurs /s/ Michael J. Corrigan
Judge MICHAEL J. CORRIGAN

APPENDIX C

STATE OF OHIO) IN THE COURT OF
) COMMON PLEAS
)
) SS.
)
CUYAHOGA COUNTY) CASE NO. CV401459
EDP
N.I
JAMES KNISKERN,etc, et al)
) F
Plaintiffs)
) JOURNAL ENTRY
RON AMSTUTZ,etc, et al)
)
Defendants)

RALPH A McALLISTER, JUDGE

This is an action brought by Plaintiffs against fifty-three (53) members of the Ohio House o Representatives, nineteen(19) members of the Ohio Senate and John Does I,II and III.

The seventy two, 72 legislator-defendants were duly elected members of the Ohio Legislature who voted for, and thus caused to be enacted into law, Am.Sub.H.B. No. 350 commonly known as the "Tort Reform" law (hereinafter Tort Reform"). Although they were acting in their official

capacity as legislators when they voted for Tort Reform, they are sued in this case in their individual capacity only. (Interestingly, Plaintiffs did not join the governor sued who signed the Tort Reform Bill into law.)

The "John Does" defendants have not been identified further, but were joined as defendants on Plaintiffs' claims that they were lobbyists who influenced defendant-legislators to vote for the Tort Reform legislation.

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The Tort Reform legislation was declared unconstitutional in toto by the Ohio Supreme Court(State ex rel. O.A.T.L v Sheward(1999), 86 Ohio St.3d 451).

Plaintiffs bring this action pursuant federal law Section 1983, Title 47, U.S.C., commonly referred to as a "1983 action".

A 1983 action requires proof that (1) the conduct complained of be committed under color of state law; and (2) the conduct deprive the claimant of rights,privileges or immunities secured by the Constitution or laws of the United States.

The factual basis for this case actually occurred on June 13, 1992, in Somerford Township, Madison County, Ohio, on highway I-70 when an automobile driven by Nino Cavaliere went off the road, travelled some 98 feet, and struck a bridge foundation causing three deaths and personal, injuries to three other passengers.

In addition to proceedings in Probate Division, Plaintiffs filed two actions in General Division of Common Pleas Court. These cases went next to two Court of Claims

actions, Cases No 94-07926 and 95-02901 PR. All were decided against the Plaintiffs who then appealed to the Ohio Supreme Court unsuccessfully. Plaintiffs now say Tort Reform caused the Supreme Court to dismiss their appeal.

Plaintiffs say that the defendants did just what Section 1983 is intended to prevent, i.e, by enacting Tort Reform they:

> ... repealed the statutory predicate upon which plaintiffs were relying thereby removing the Supreme Court of Ohio's constitutional right to grant plaintiffs a discretionary appeal hearing, and as a matter of law compelling the court to deprive plaintiffs of their discretionary appeal to the Court.(Complaint, par. 32)

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Plaintiffs also claim they bring this action against the legislator-defendants:

> ... in their individual capacity, in that they knowingly, intentionally, maliciously and with wilful (sic) or wanton disregard for the civil rights of the plaintiffs, acted under color of law, to damage the plaintiffs in their suit against the State of Ohio, by acting judicially through the enactment of Am.Sub.H.B. No. 350,that repealed certain language in Ohio statutes, relevant to the facts of plaintiffs' cases, that

> plaintiffs had relied upon both as a basis of the State's tort liability and in their Memorandum of jurisdiction, to establish that the issue presented thereby, were issues of public or great general interest, jurisdictionally qualifying plaintiffs for a discretionary appeal in the Supreme court of Ohio. Complaint, par. 8)

Plaintiffs' claims are based on mere speculation. They had no federally protected right to appeal to the Supreme Court. They cannot say persuasively that but for Tort Reform the Supreme Court would have accepted their appeal(Case No.96- 1861). Indeed, the Supreme Court disposed of the appeal sua sponte with a one-line entry on December 20, 1996, to wit: "No substantial constitutional question; discretionary appeal not allowed".
(Kniskern v Somerford Twp., 77 Ohio St.3d 1485.)

Plaintiffs Motion for Reconsideration of the dismissal was denied on December 30, 1996. (Kniskern v. Somerford Twp., 77 Ohio St.3d 1549.)

Am.Sub.H.B. 350 became effective January 7, 1997 subsequent to the Supreme Court's actions in denying both the discretionary appeal and Motion for Reconsideration. It defies credulity for Plaintiffs to claim that "Tort Reform" influenced the Supreme Court's decisions denying their discretionary appeal.

The damages Plaintiffs seek in this case have been judicially determined in prior cases to have been caused by

the driver of their automobile who fell asleep at the wheel

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It should be noted that the Ohio Constitution provides (in pertinent part):

> Senators an representatives...for any speech, or debate,in either house, they shall not be questioned elsewhere.(Ohio Constitution, Art.II, Sec. 12)

The United States Constitution provides almost identical language in Article I, Sec 6:

> The Senators and Representatives... for any Speech or Debate in either House, they shall not be questioned in any other place.

These two constitutional provisions alone should be sufficient basis on which to grant Summary Judgment of Dismissal.

But case law clearly establishes that legislators are absolutely immune from suit filed pursuant to Section 1983 when acting in their legislative capacity. Although Plaintiffs state repeatedly that they are suing defendants "in their personal capacity", each defendant who voted for Tort Reform did so as a legislator, not as a private citizen.

Plaintiffs cite no authority to the contrary.

It is clear that Plaintiffs are merely engaging in exaggerated unsupported speculation when they seek to place responsibilities for their injuries, wrongful deaths and damages on defendant-legislators who were doing what they were elected to do, i.e., consider and vote for legislation, when they voted for Tort Reform. As the Supreme Court opinion stated in State ex rel. O.A.T.L v. Sheward (supra) at 455:

> For more than a decade, Ohio has been 1home to an ongoing conflict over the necessity and propriety of transforming the civil justice system... Research indicates there is a vast amount of scholarly analysis available on either side of virtually every conceivable aspect of this debate. All arguments going to the soundness of legislative policy, however, are directed to their proper place, which is outside the door to this courthouse. This court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the

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legislative branch of the government. State ex rel.

Bishop v Mt. Orab Village School District Board of Education (1942, 139 Ohio St. 427

The fact that Sheward (supra) was decided by a 4-3 vote of the justices is further evidence of the controversy attending this Tort Reform

Legislators, to be effective in their elective responsibilities, are necessarily confronted with differences of opinion as to the merits of bills presented to them for consideration and vote. This explains why, historically and constitutionally, they cannot be questioned on their legislative actions. They are absolutely immune, personally or otherwise, from the claims presented against them in this case.

It would serve no purpose to cite all the case law supporting absolute immunity for legislators. (See Motion of State Defendants for Summary Judgment and Memorandum of Support filed by defendants in this case.)

One case, however, deserves some comment here because plaintiffs seem to have relied upon it in spite of the fact that it presents a fact situation quite different from the one presented in the case at bar. At pages 24,25 of Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, Plaintiffs state:

> The whole legal rational(sic) of the case of Hafer v Melo, Jr.(1991) 502 U.S. 21 stands for the legal proposition that state officers may be personally liable for damages under 42 U.S.C

> §1983 based on actions taken in their official capacities when sued in their individual capacity..

But Hafer (supra) says much more than that. In ruling that the auditor general of Pennsylvania did not have immunity from suit, the Supreme Court state, at page 29:

> This court has refused to extend absolute immunity beyond a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions, "whose special functions or constitutional status requires complete protection from suit" Haslow v Fitzgerald, 457 U.S. 800.

It is clear, then, that Plaintiffs have ignored the law, and the reasoning supporting it, that holds legislators absolutely immune from such as this in the circumstances of defendants actions in voting for Tort Reform or any other legislation.

Defendant-legislators cannot be held personally liable

for damages suffered by plaintiffs simply because they voted for legislation which was later declared unconstitutional. It is beyond controversy that Plaintiffs' damages were caused by negligence of their driver in causing their automobile crash. Plaintiffs are simply attempting to fix responsibility for the damages on the legislator-defendants by asserting an irresponsible, legally untenable theory of speculation as to what the Supreme Court may have considered in denying their discretionary appeal.

The claims and faulty legal reasoning spread upon volumes of paper pages file by Plaintiffs in this case come as close to "frivolous" as one can imagine. The complaint itself (49 pages plus 52 pages of exhibits violates Civ. 8 and could be subject to an order striking it from the file. It will be remembered for its prolixity, not for its substance.

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There being no issues of material fact sufficient to overcome their absolute immunity, Defendants' Motion for Summary Judgment of dismissal is granted to all defendants in this case. All other defendants and pending motions are dismissed at Plaintiffs' costs.

IT IS SO ORDERED

Date July 21, 2000 Signed Ralph A. McAllister
RALPH A McALLISTER, JUDGE

RECEIVED FOR FILING

JUL 24, 2000

GERALD E.FUERST
(Signed)ByL.Shoulders Dep.

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APPENDIX D

The Supreme Court of Ohio

Filed
Oct 24 2001
Marcia J. Mengel, Clerk
Supreme Court of Ohio

James Kniskern et al.,	:	Case No. 01 - 1428
Appellants,	:	
v.	:	ENTRY
Ron Amstutz et al.,	:	
Appellees	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Donald Weisberger.

(Cuyahoga County Court of Appeals; No 78407)

Signed Thomas J. Moyer
Thomas J. Moyer
Chief Justice

APPENDIX E

The Supreme Court of Ohio

Filed
Dec 05 2001
Marcia J. Mengel, Clerk
Supreme Court of Ohio

James Kniskern et al.,	:	Case No. 01 - 1428
Appellants,	:	
		RECONSIDERATION
v.	:	ENTRY
		(Cuyahoga County)
Ron Amstutz et al.,	:	
Appellees	:	

It is ordered by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No 78407)

Signed Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

0027r102401

APPENDIX F

THE CONSTITUTION OF THE UNITED STATES

ARTICLE I, SECTION 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any title of Nobility. ....

ARTICLE III, SECTION 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ....

SECTION 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States And Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other Public Ministers and Consuls;--to all Cases of admiralty or maritime Jurisdiction; --to Controversies which the United States shall be a Party; --to Controversies between tow or more States; --between a State and Citizens of another

State;

--between Citizens of different States; --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. ...

ARTICLE IV, SECTION 2, CLAUSE 1

The Citizens of each State shall be entitled to all the Privileges and immunities of citizens in the several States. ..

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at

any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States,

authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Proposed 1866, Adopted 1868)

APPENDIX G

FEDERAL STATUTES

42 USCA § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX H

OHIO CONSTITUTION

O CONST I § 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

O CONST IV § 2 ORGANIZATION AND JURISDICTION OF SUPREME COURT

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction ...

in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony

on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

(3) Supreme Court, U.S.
FILED

011343 MAR -5 2002

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

JAMES KNISKERN, et al.,
Petitioners,

v.

RON AMSTUTZ, et al.,
Respondents.

On Petition for Writ of Certiorari
To the Ohio Supreme Court & Ohio Court of Appeals,
Eighth Appellate District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Vol. II of IV
Pages 38- 81, I-K

Donald D. Weisberger
Ohio Reg. No. 0000908
Counsel of Record for Petitioners
Tel. & Fax: (216) 932-5227

3688

APPENDIX I

STATE STATUTES

Ohio R. C. § 109.02 DUTIES

The attorney general is the chief law officer for the state and all its departments and shall be provided with adequate office space in Columbus. Except as provided in division (E) of section 120.06 and in sections 3517.152 to 3517.157 of the Revised Code, no state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in trial and argument of all civil and criminal cases in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, the attorney general shall prosecute any person indicted for a crime.

Ohio R. C. 723.01 LEGISLATIVE AUTHORITY TO HAVE CARE, SUPERVISION, AND CONTROL OF STREETS

Municipal corporations shall have special power to regulate the use of the streets. Except as provided in section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges aqueducts, and viaducts within the municipal corporation, and the municipal corporation shall cause them to be kept open, in repair, and free from nuisance (2001 S § 2.01 eff. 7-6-01; 2001 S 108, § 2.02 eff. 7-6-1; 1996 H 350 eff. 1-27-97

UNCODIFIED LAW

2001 S 108, § 1 eff. 7-6-01

It is the intent of this act (1) to repeal the Tort Reform Act, Am.Sub.H.B. No. 350 of the 121st General Assembly, 146 Ohio Laws 3867, in conformity with the Supreme Court of Ohio's decision in State ex.rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451; (2) to clarify the status of the law; and (3) to revive the law as it existed prior to the Tort Reform Act.

2001 S 108 § 3, eff. 7-6-01, reads in part:

Sections 163.17, 723.01, 1343.03, 1775.14, 2305.01, 2305.11, 2305.35, 2307.33, 2307.71, 2307.72, 2307.73, 2307.78, 2315.20, 2317.62, 2323.51, 2744.04, 4112.99, 4909.42, 5591.36, and 5591.37 of the Revised Code are revived and supercede the versions of the same sections that are repealed by Section 2.02 of this act.

2743.02 WAIVER OF IMMUNITY OF STATE; PERSONAL IMMUNITY NOT AVAILABLE TO STATE; HOSPITALS OF POLITICAL SUBDIVISIONS; COLLATERAL RECOVERY; INDEMNIFICATION OF PERSONNEL; ACTIONS AGAINST STATE PERSONNEL; THIRD-PARTY COMPLAINTS AND COUNTERCLAIMS

(A)(1) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to

July 28, 1975.

(C) Any hospital, as defined under section 2305.11 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of his duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if such hospital requests him to do so, the superintendent shall recommend, a specific amount for any period that, in his opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other

collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for two thousand five hundred dollars or less, that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under

section 9.86 of the Revised Code.

(G) Whenever a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or omission complained of, subject to the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671, et seq., then the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section.

OHIO R. C. § 2744.02 POLITICAL SUBDIVISION NOT LIABLE FOR INJURY, DEATH, OR LOSS, EXCEPTIONS(PRE 1996 H 350 AMENDMENT

(B)(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property that is caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open in repair and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting that bridge.

OHIO R.C. § 5535.15 ROAD CONSTRUCTION OR IMPROVEMENT BY COUNTY, TOWNSHIP, OR

MUNICIPAL CORPORATION

(A) The board of county commissioners, board of township trustees, or legislative authority of a municipal corporation may maintain, repair, construct, reconstruct, improve, or widen any section of a road under the control of the state or another political subdivision if all of the following apply:

(1) The county, township, or municipal corporation proposing the project declares to the state or political subdivision the reasonable necessity of the construction or improvement. The declaration shall be by resolution or ordinance. A certified copy shall be sent to the director of transportation when a state highway is the subject of the proposal and to the affected political subdivision when any other highway is the subject of the proposal.

(2) The documents, plans, reports, or other materials relating to the project comply with applicable design development criteria of the department of transportation and the federal highway administration, which compliance is determined by the director in the manner provided in section 5521.13 of the Revised Code;

(3) The county, township, or municipal corporation proposing the project certifies to the state or political subdivision, in the resolution or ordinance required by division (A)(1) of this section, that all funds necessary to complete the project are available either privately or from the

county, township, or municipal corporation proposing the project.

The county, township, or municipal corporation proposing the project may acquire by gift, purchase, condemnation, or otherwise, any lands required for the construction or improvement.

(B) Upon compliance with the requirements of division (A) of this section, the county, township, or municipal corporation proposing the project may proceed only with the consent of the department. The state or other political subdivision having control over the road may contribute to the cost of the construction or improvement.

(C) Any person may appeal an action taken by a county, township, or municipal corporation under this section. The appeal may be taken to the probate court or the court of common pleas of any county in which any part of the construction or improvement is located, and shall be limited to a determination of compliance with division (A) of this section.

(D) After completion of the project, the state or political subdivision having control of the road shall repair and maintain it if the project is accepted by the state or political subdivision. Upon such acceptance, the county, township, or municipal corporation constructing or improving the road under this section may contribute to the cost of repair and

maintenance of the road. If the project is not accepted by the state or political subdivision having control of the road, the county, township, or municipal corporation constructing or improving the road shall repair and maintain it.

OHIO R.C. § 5591.36 GUARDRAILS OR HEDGE FENCE FOR BRIDGES

The board of county commissioners shall erect and maintain, where not already done, one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high and on each side of every approach to a county bridge, viaduct, or culvert, if the approach or embankment is more than six feet high. The board shall also protect, by suitable guardrails, all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway other than state highways, or are adjacent thereto in an unprotected condition.

It shall be a sufficient compliance with this section, if the board causes to be erected and maintained a good stockproof hedge fence where a guardrail is required. Such guardrails or hedge fences shall be erected in a substantial manner, having sufficient strength to protect life and property, the expense thereof to be paid out of the county bridge fund.

OHIO R.C. § 5591.37 NONCOMPLIANCE

Failure to comply with section 5591.36 of the Revised Code shall render the county liable for all accidents or damages as a result of such failure.

It shall be a sufficient compliance with this section, if the board causes to be erected and maintained a good stockproof hedge fence where a guardrail is required. Such guardrails or hedge fences shall be erected in a substantial manner, having sufficient strength to protect life and property, the expense thereof to be paid out of the county bridge fund.

APPENDIX J

AMENDED SUBSTITUTE HOUSE BILL NO. 350

Act Effective Date: 1-27-97
Date Passed: 9-26-96
Date Approved by Governor: 10-28-96
Date Filed: 10-28-96
File Number: 244
Chief Sponsor: TIBERI

2744.01 Definitions (Eff. 1-27-97)
As used in this chapter:
(A) "Emergency call" means a call to duty, including, but not limited to,
communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.
(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of <<- his ->> <<+ the officer's, agent's, employee's, or servant's +>> employment for a political subdivision. "Employee" does not
include an independent contractor <<- , ->> <<+ and +>> does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted o f or pleaded guilty to a criminal offense

and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2151.355 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and

extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally

generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a human services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the

approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any park, playground, playfield, indoor recreational facility, zoo, zoological park, bath, or swimming pool or pond, and the operation and control of any golf course;

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section

4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, a fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, and county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code.

(G)(1) "Proprietary function" means a function of a political

subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:
(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;
(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.
(2) A "proprietary function" includes, but is not limited to, the following:
(a) The operation of a hospital by one or more political subdivisions;
(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;
(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
(d) The maintenance, destruction, operation, and upkeep of a sewer system;
(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.
(H) <<+ " Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices, unless the traffic control devices are mandated by the Ohio manual of

uniform traffic control devices. +>>
<<+ (I) +>> "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

OHIO R.C. § 2744.02 Political subdivision not liable for injury, death, or loss; exceptions [Eff. 1-27-97]
(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to <<- persons ->> <<+ person +>> or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.
(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.
(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to <<- persons ->> <<+ person +>> or property allegedly caused by an act or omission of the political subdivision or of any of its

employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property caused by the negligent operation of any motor vehicle by their employees upon the public roads <<- , highways, or streets ->> when the employees are engaged within the scope of their employment and authority. The following are full defenses to <<- such ->> <<+ that +>> liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other fire fighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section

4511.03 of the Revised Code.

(2) Except as otherwise provided in section 3746.24 of the Revised Code,

political subdivisions are liable for injury, death, or loss to <<-

persons ->> <<+ person +>> or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property caused by their <<+ negligent +>> failure to keep public roads <<- , highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, ->> in repair <<- , and free from nuisance ->> <<+ and other negligent failure to remove obstructions from public roads +>> , except that it is a full defense to <<- such ->> <<+ that +>> liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property that is caused by the negligence of their employees and that occurs within or on the grounds of <<+ , and is due to physical defects within or on the grounds of, +>> buildings that are used in connection with the performance of a governmental function, including, but not limited to, office

buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.
(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because <<+ that section imposes +>> a responsibility <<- is imposed ->> <<+ or mandatory duty +>> upon a political subdivision <<- or ->> <<+ , +>> because of a general authorization <<+ in that section +>> that a political subdivision may sue and be sued <<+ , or because that section uses the term "shall" in a provision pertaining to a political subdivision. +>>
<<+ (C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744. or any other provision of the law is a final order. +>>

OHIO R.C § 2744.03 Defenses and immunities [Eff. 1-27-97]

(A) In a civil action brought against a political subdivision or

an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial,prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of <<- his ->> <<+ the person's +>> sentence by performing

community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2151.355 of the Revised Code, and if, at the time of <<- his ->> <<+ the person's or child's +>> injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or section 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) <<- His ->> <<+ The employee's +>> acts or omissions were manifestly outside the scope of <<- his ->> <<+ the employee's +>> employment or official responsibilities;

(b) <<- His ->> <<+ The employee's +>> acts or omissions

were with malicious purpose, in bad faith, or in a wanton or reckless manner;
(c) Liability is expressly imposed upon the employee by a section of the Revised Code. <<+ Liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee. +>>
(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.
(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

OHIO R.C. § 2744.04.

(A) An action against a political subdivision to recover damages for injury, death, or loss to <<- persons ->> <<+ person +>> or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim,

counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action <<- arose ->> <<+ accrues +>>, or within any applicable shorter period of time for bringing the action provided by the Revised Code. <<+ The period of limitation contained in this division shall be tolled pursuant to section 2305.16 of the Revised Code+>>

This division applies to actions brought against political subdivisions by all persons, governmental entities, and the state.

(B) In the complaint filed in a civil action against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to <<- persons ->> <<+ person +>> or property allegedly caused by an act or omission in connection with a governmental or proprietary function, whether filed in an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, the complainant shall include a demand for a judgment for the damages that the judge in a nonjury trial or the jury in a jury trial finds that the complainant is entitled to be awarded, but shall not specify in that demand any monetary amount for damages sought.

R.C. § 2744.05.

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to <<- persons ->> <<+person +>> or property caused by an act or omission in connection with a governmental or

proprietary function:
(A) Punitive or exemplary damages shall not be awarded <<- ; ->> <<+ . +>>
(B) <<+ (1) +>> If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to <<- such ->> <<+ those +>> benefits. <<- Nothing ->> <<+ The amount of the benefits shall be deducted from an award against a political subdivision under division (B)(1) of this section regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery, in whole or in part, for the claim. A claimant whose benefits have been deducted from an award under division (B)(1) of this section is not considered fully compensated and shall not be required to reimburse a subrogated claim for benefits deducted from an award pursuant to division (B)(1) of this section. +>>
(2) <<+ Nothing +>> in <<- this ->> division (B)(1) <<+ of this section +>> shall be construed to limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds.
(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death

actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

(2) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(a) All wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of <<- such a ->> <<+ the +>> person <<+ injured +>> ;

(b) All expenditures of the person injured or another person on <<- his ->> behalf <<+ of the person injured +>> for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on <<- his ->> behalf <<+ of the person injured +>> for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(d) All expenditures of a person whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person whose property was injured or destroyed +>> in order to repair or replace the property that was injured or destroyed;

(e) All expenditures of the person injured or <<+ of the person +>> whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person injured or of the person whose property was injured or destroyed +>> in relation to the actual preparation or presentation of the <<- person's ->> claim <<+ involved +>> ;

(f) Any other expenditures of the person injured or <<+ of the person +>> whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person injured or of the person whose property was injured or destroyed +>> that the court determines represent an actual loss experienced because of the personal or property injury or property loss. "The actual loss of the person who is awarded the damages" does not include any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss, and does not include any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

R.C. § 2744.06.

(A) Real or personal property, and moneys, accounts, deposits, or investments of a political subdivision are not subject to execution, judicial sale, garnishment, or attachment to satisfy a judgment rendered against a political subdivision in a civil action to recover damages for injury, death, or loss to <<- persons ->> <<+ person +>> or property caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. <<- Such ->> <<+ Those +>> judgments shall be paid from funds of the political subdivisions that have been appropriated for that purpose, but, if sufficient funds are not currently appropriated for the payment of judgments, the fiscal officer of a political subdivision shall certify the amount of any unpaid judgments to the taxing authority of the political subdivision for inclusion in the next succeeding budget and annual appropriation measure and payment in the next succeeding fiscal year as provided by section 5705.08 of the Revised Code,unless any <<- such ->> judgment <<+ of that nature +>> is to be paid from the proceeds of bonds issued pursuant to section 133.14 of the Revised Code or pursuant to annual installments authorized by division (B) or (C) of this section. (B)(1)(a) as used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(i) All wages, salaries, or other compensation lost by the person injured as a result of the injury, as of the date of the judgment;

(ii) All expenditures of the person injured or of another

person on <<- his ->> behalf <<+ of the person injured +>> for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(iii) All expenditures of a person whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person whose property was injured or destroyed +>> in order to repair or replace the property that was injured or destroyed;

(iv) All expenditures of the person injured or whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person injured or whose property was injured or destroyed +>> in relation to the actual preparation or presentation of the <<- person's ->> claim <<+ involved +>> ;

(v) Any other expenditures of the person injured or <<- of the person ->> whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person injured or whose property was injured or destroyed +>> that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

(b) As used in this division, "the actual loss of the person who is awarded the damages" does not include any of the following:

(i) Wages, salaries, or other compensation lost by the person injured as a result of the injury, that are future expected earnings of <<- such a ->> <<+ that +>> person;

(ii) Expenditures to be incurred in the future, as determined by the court, by the person injured or by another person on

<<- his ->> behalf <<+ of the person injured +>> for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(iii) Any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss;

(iv) Any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

(2) Except as specifically provided to the contrary in this division, a court that renders a judgment against a political subdivision as described in division (A) of this section and that is not in favor of the state may authorize the political subdivision, upon the motion of the political subdivision, to pay the judgment or a specified portion of the judgment in annual installments over a period not to exceed ten years, subject to the payment of interest at the rate specified in <<+ division (A) of +>> section 1343.03 of the Revised Code. A court shall not authorize the payment in installments under this division of any portion of a judgment or entire judgment that represents the actual loss of the person who is awarded the damages. Additionally, a court shall not authorize the payment in installments under this division of any portion of a judgment or entire judgment that does not represent the actual loss of the person who is awarded the damages unless the court, after balancing the interests of the political

subdivision and of the person in whose favor the judgment was rendered, determines that installment payments would be appropriate under the circumstances and would not be unjust to the person in whose favor the judgment was rendered. If a court makes <<- such ->> a determination <<+ of that nature +>> , it shall fix the amount of the installment payments in <<- such ->> a manner <<- as to achieve ->> <<+ that achieves +>> for the person in whose favor the judgment was rendered <<- , ->> the same economic result over the period as <<-he ->> <<+ that person +>> would have received if the judgment or portion of the judgment subject to the installment payments had been paid in a lump sum payment.

(C) At the option of a political subdivision, a judgment as described in division (A) of this section and that is rendered in favor of the state may be paid in equal annual installments over a period not to exceed ten years, without the payment of interest.

<< Note: OH ST s 2305.11 >>

(B) The amendments to section 2305.11 of the Revised Code made in this act shall apply only to acts or omissions constituting the alleged basis of a claim of malpractice or of a medical, dental, optometric, or chiropractic claim, as defined in that section, that occur on or after the effective date of this act.

<< Note: OH ST s 2744.05 >>

(C) The amendments to section 2744.05 of the Revised Code made in this act shall apply only to actions against a political subdivision under Chapter 2744. of the Revised Code that are commenced on or after the effective date of this act.

<< OH ST s 5591.36 >>

Sec. 5591.36. <<- The ->> <<+ On county roads, the +>> board of county commissioners shall erect and maintain, where not already done, one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high <<- and on each side of every approach to a county bridge, viaduct, or culvert, if the approach or embankment is more than six feet high ->> . The board <<+ also +>> shall <<- also ->> protect, by <<- suitable ->> guardrails, all <<- perpendicular wash banks more than eight feet in height ->> <<+ embankments with a rise of more than eight feet in height and with a downward slope of greater than seventy degrees +>> , where <<- such banks ->> <<+ the embankments +>> have an immediate connection with a <<- public highway other than state highways, or are adjacent thereto in an unprotected condition ->> <<+ county road. +>> <<- It shall be a sufficient compliance with this section, if the board causes to be erected and maintained a good stockproof hedge fence where a guardrail is required. Such guardrails or hedge fences shall be erected in a substantial manner, having sufficient strength to protect life and

property, the ->> <<+ The +>> expense <<- thereof to ->> <<+ for a guardrail required under this section shall +>> be paid out of the county bridge fund.

<< OH ST s 5591.37 >>

Sec. 5591.37. <<- Failure ->> <<+ Negligent failure +>> to comply with section 5591.36 of the Revised Code shall render the county liable for all accidents or damages as a result of <<- such ->> <<+ that +>> failure.

<< Repealed: OH ST ss 2305.131, 2305.27, 2307.42, 2307.43, 2309.01 >>

Section 2. That existing sections 109.36, 163.17, 723.01, 1343.03, 1701.95, 1707.01, 1775.14, 1901.041, 1901.17, 1901.18, 1901.181, 1901.20, 1905.032, 2117.06, 2125.01, 2125.02, 2125.04, 2305.01, 2305.10, 2305.11, 2305.16, 2305.25, 2305.251, 2305.35, 2305.37, 2305.38, 2307.31, 2307.32, 2307.33, 2307.60, 2307.61, 2307.71, 2307.72, 2307.73, 2307.75, 2307.78, 2307.80, 2315.01, 2315.18, 2315.19, 2315.20, 2315.21, 2317.45, 2317.62, 2323.51, 2501.02, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.04, 2744.05, 2744.06, 3113.219, 3701.19, 3722.08, 4112.02, 4112.14, 4112.99, 4113.52, 4171.10, 4399.18, 4507.07, 4513.263, 4582.27, 4909.42, 5111.81, 5591.36, and 5591.37 and
sections 2305.131, 2305.27, 2307.42, 2307.43, and 2309.01 of the
Revised Code are hereby repealed.

Supreme Court, U.S.
FILED

011343 MAR -5 2002

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

JAMES KNISKERN, et al.,
Petitioners,

v.

RON AMSTUTZ, et al.,
Respondents.

On Petition for Writ of Certiorari
To the Ohio Supreme Court & Ohio Court of Appeals,
Eighth Appellate District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Vol. III of IV
Pages 82- 128, L-O

Donald D. Weisberger
Ohio Reg. No. 0000908
Counsel of Record for Petitioners
Tel. & Fax: (216) 932-5227

APPENDIX K

OH LEGIS 26 (2001)
2001 Ohio Laws File 26 (S.B. 108)

OHIO 2001 SESSION LAW SERVICE
124TH GENERAL ASSEMBLY

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Additions are indicated by <<+Text+>>; deletions by <<-Text->>. Changes in tables are made but not highlighted.

File 26
S.B. No. 108
CIVIL PROCEDURE—TORT REFORM

AN ACT To amend sections 1701.95, 1707.01, 1901.18, 2101.31, 2305.25, 2305.251, 2305.37, 2307.24, 2307.27, 2307.30, 2307.60, 2307.61, 2313.46, 2315.23, 2315.24, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.05, 3123.17, 4112.02, 4507.07, 4513.263, 4582.27, and 5111.81; to amend, for the purpose of adopting new section numbers as indicated in parentheses, sections 2307.24 (2307.16), 2307.27 (2307.17), 2307.30 (2307.18), 2315.07 (2315.05), 2315.08 (2315.06), 2315.23 (2315.08), and 2315.24 (2315.09); to revive and amend sections 109.36, 2117.06, 2125.01, 2125.02, 2125.04, 2305.10, 2305.16, 2305.27, 2305.38, 2307.31, 2307.32, 2307.75, 2307.80,

2315.01, 2315.19, 2315.21, 2501.02, 2744.06, 3722.08, 4112.14, 4113.52, 4171.10, and 4399.18; to revive, amend, and amend, for the purpose of adopting a new section number as indicated in parentheses, section 2315.18 (2315.07); to revive sections 163.17, 723.01, 1343.03, 1775.14, 2305.01, 2305.11, 2305.35, 2307.33, 2307.71, 2307.72, 2307.73, 2307.78, 2315.20, 2317.62, 2323.51, 2744.04, 4112.99, 4909.42, 5591.36, and 5591.37; to repeal sections 109.36, 163.17, 723.01, 1343.03, 1775.14, 1901.041, 1901.17, 1901.181, 1901.20, 1905.032, 2117.06, 2125.01, 2125.02, 2125.04, 2305.01, 2305.10, 2305.11, 2305.16, 2305.35, 2305.38, 2307.32, 2307.33, 2307.331, 2307.71, 2307.72, 2307.73, 2307.75, 2307.78, 2307.801, 2315.01, 2315.18, 2315.19, 2315.20, 2315.21, 2317.62, 2323.51, 2501.02, 2744.04, 2744.06, 3701.19, 3722.08, 4112.14, 4112.99, 4113.52, 4171.10, 4399.18, 4909.42, 5591.36, and 5591.37, as they result from Am. Sub. H.B. 350 of the 121st General Assembly to repeal sections 901.52, 2101.163, 2151.542, 2303.202, 2305.011, 2305.012, 2305.113, 2305.131, 2305.252, 2305.381, 2305.382, 2307.31, 2307.42, 2307.43, 2307.48, 2307.791, 2307.792, 2307.80, 2309.01, 2315.37, 2317.45, 2317.46, 2323.54, and 2323.59; to repeal sections 1901.262 and 1907.262, as enacted by Am. Sub. H.B. 350; to suspend part of section 1707.01; and to suspend sections 1707.432, 1707.433, 1707.434, 1707.435, 1707.436, 1707.437, and 1707.438 of the Revised Code and to amend Section 3 of Am. Sub H.B. 438 of the 121st General Assembly and to repeal Sections 3, 4, 5, 6, 7, 8, 9, 13, and 16 of Am. Sub. H.B. 350 of the 121st

General Assembly to repeal the Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly; to clarify the status of the law; to reorganize certain tort related provisions; and to revive prior law; to amend sections 2744.01 and 2744.03 of the Revised Code as scheduled to take effect on January 1, 2002, to continue the amendments of this act on and after that date; and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. It is the intent of this act (1) to repeal the Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly, 146 Ohio Laws 3867, in conformity with the Supreme Court of Ohio's decision in State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward (1999), 86 Ohio St.3d 451; (2) to clarify the status of the law; and (3) to revive the law as it existed prior to the Tort Reform Act.

Section 2.01. That sections 1701.95, 1707.01, 1901.18, 2101.31, 2305.25, 2305.251, 2305.37, 2307.24, 2307.27, 2307.30, 2307.60, 2307.61, 2313.46, 2315.23, 2315.24, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.05, 3123.17, 4112.02, 4507.07, 4513.263, 4582.27, and 5111.81 be amended; that sections 2307.24 (23071.6), 2307.27 (2307.17), 2307.30 (2307.18), 2315.07 (2315.05), 2315.08 (2315.06), 2315.23 (2315.08), and 2315.24 (2315.09) be amended for the purpose of adopting new section numbers as indicated in parentheses; that sections 109.36, 2117.06, 2125.01, 2125.02, 2125.04, 2305.10,

2305.16, 2305.27, 2305.38, 2307.31, 2307.32, 2307.75, 2307.80, 2315.01, 2315.19, 2315.21, 2501.02, 2744.06, 3722.08, 4112.14, 4113.52, 4171.10, and 4399.18 be revived and amended; that section 2315.18 (2315.07) be revived, amended, and amended, for the purpose of adopting a new section number as indicated in parentheses; and that sections 163.17, 723.01, 1343.03, 1775.14, 2305.01, 2305.11, 2305.35, 2307.33, 2307.71, 2307.72, 2307.73, 2307.78, 2315.20, 2317.62, 2323.51, 2744.04, 4112.99, 4909.42, 5591.36, and 5591.37 of the Revised Code be revived, all to read as follows:

Note: Text of Statutes Omitted.

Section 5.03. Notwithstanding the attempted amendment of Section 3 of Am. Sub. H.B. 438 by Am. Sub. H.B. 350 of the 121st General Assembly, section 2317.023 of the Revised Code, as enacted by Am. Sub. H.B. 438 of the 121st General Assembly, took effect on July 1, 1997.

Section 6. Sections 3, 4, 5, 6, 7, 8, 9, 13, and 16 of Am. Sub. H.B. 350 of the 121st General Assembly are repealed.

Section 7. In sections contained in this act that have been amended by acts subsequent to their amendment by Am. Sub. H.B. 350 of the 121st General Assembly (other than section 1901.18 of the Revised Code), matter removed by Am. Sub. H.B. 350 is revived, and matter inserted by Am.

Sub. H.B. 350 is removed, by amendment indicated as directed in rule 103-5-01 of the Administrative Code. But, notwithstanding rule 103-5-01 of the Administrative Code, in sections contained in this act that have not been amended by acts subsequent to their amendment by Am. Sub. H.B. 350 of the 121st General Assembly (1) matter removed by Am. Sub. H.B. 350 is revived by being reinserted without underlining, so as to indicate the intention that it is old law that is being revived and (2) matter inserted by Am. Sub. H.B. 350 is removed by being omitted, so as to indicate the intention that, by virtue of its noninclusion, it is being repealed because constitutionally meaningless. In section 1901.18 of the Revised Code, ratification of Sub. H.B. 350's cross-reference correction is indicated by amendment as directed in rule 103-5-01 of the Administrative Code.

<<Note: OH ST □□ 109.36, 4112.02>>

Section 8. Section 109.36 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. H.B. 715 and Am. Sub. H.B. 571 of the 120th General Assembly. Section 4112.02 of the Revised Code is presented in this act as a composite of the section as amended by both Am. H.B. 264 and H.B. 471 of the 123rd General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting version of the sections in

effect prior to the effective date of the sections as presented in this act.

Section 9. This act is an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for the necessity is that repeal of the Tort Reform Act and revival of prior law will clarify the status of law that is unsettled as a result of the act being held unconstitutional. Therefore, this act goes into immediate effect.

Date Passed: June 21, 2001

Approved July 6, 2001

Act Eff. July 6, 2001

OH LEGIS 26 (2001)

END OF DOCUMENT

APPENDIX L

OHIO CIVIL RULE 24

(A) **Intervention of right**

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as practical matter impair or impede the applicants ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

(B) **Permissive intervention**

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicants claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(C) **Procedure**

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanies by a pleading, as defined in Civ. R. 7(A), setting forth the claim or defense for which the intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.

APPENDIX M

• DR7-107 TRIAL PUBLICITY

(A) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would be expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood or materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding division (A) of this rule, a lawyer may state any of the following:

(1) The claim, offense, or defense involved and except when prohibited by law , the identity of the persons involved;

(2) Information contained in a public record.

(3) That an investigation of a matter is in progress.

(4) The scheduling or result of any step in litigation

(5) The request for assistance in obtaining evidence and information necessary to obtain evidence

(6) A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest;

APPENDIX N

RULE 15. ASSIGNMENT OF CIVIL CASES FOR TRIAL

(A) All civil cases shall be assigned to a judge by drawing a card from a sealed deck handled by the Clerk under the supervision of the Court Administrator. The deck shall be constructed so as to insure that the identity of the next judge's name is unknown until the card is drawn.

(B) It shall be the duty of the assigned judge to handle all court activity, including motions, emergency matters, case management conferences, pretrials and any post trial matters associated with the cases assigned to the docket.

Paragraphs C-J omitted as not pertinent.

Effective November 1, 1991; amended effective May 1, 1999. Sections C-J of Rule 15 omitted.

APPENDIX O

COMPLAINT

COUNT I

1. The Count I defendants, some of whom reside in Cuyahoga County, Ohio, were and/or are the duly elected members of the Ohio Legislature of both the Ohio House of Representatives and Ohio Senate, that constituted the 121st General Assembly of Ohio, that acted under color of law, and caused to be enacted into law Am.Sub.H.B. No. 350, and are sued herein, in their individual capacity only.

2. Am.Sub.H.B. No. 350 has subsequently been interpreted, not to be a constitutional legislative act, but was found by the Supreme Court of Ohio from the circumstances leading to its enactment, to be an intentional, ultra vires, judicial act of the Ohio Legislature that usurped judicial power as set forth in the Court's opinion, and in its syllabi 2 & 3, in the case it decided on August 16, 1999, published September 29, 1999 in the Ohio State Bar Association's Report, denominated The State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, that states as follows in syllabus 2:

> "Am.Sub.H.B. No. 350 usurps judicial power in violation of the Ohio constitutional doctrine of separation of powers and, therefore, is unconstitutional.

Syllabus No. 3 states:

"Am.Sub.H.B. No. 350 violates the one-subject provision of Section 15(D), Article II of the Ohio Constitution, and is unconstitutional **in toto**."

3. Plaintiffs, as detailed in paragraphs 53, 59-65, are former personal injury and wrongful death plaintiffs, in cases litigated against the State of Ohio and certain of its political subdivisions, that were adjudicated by summary judgment against plaintiffs by the Court of Claims of Ohio in Columbus, Ohio and then affirmed on appeal by the Franklin County Court of Appeals also in Columbus, and then, at a pivotal point in that litigation, with plaintiffs' cases pending before the Supreme Court of Ohio awaiting a ruling upon plaintiffs' Memorandum In Support of Jurisdiction, plaintiffs' cases were, then and there, rendered de facto res adjudicata by the Ohio Legislature, by and through the Legislature's enactment and passage of its ultra vires, judicial act, Am.Sub.H.B. No. 350, as will hereinafter be more fully described.

4. Plaintiffs' cases became de jure res adjudicata, when the Supreme Court of Ohio, compelled as a matter of law, to take judicial notice of the Legislature's enactment of Am.Sub.H.B. No. 350, in October 1996, subsequently issued its order in which it declined to exercise or grant its constitutionally mandated, discretionary jurisdiction and denied granting an appeal to plaintiffs to review and hear their cases.

5. Plaintiffs' legal briefs, pending before the Supreme

Court of Ohio, prior to the enactment of Am.Sub.H.B. No. 350, qualified for such an appeal to the Supreme Court of Ohio, in that plaintiffs' Memorandum In Support of Jurisdiction had relied upon certain long standing, unrepealed, controlling statutory language in Ohio statutes, relevant to the particular facts peculiar to plaintiffs' cases, that raised and presented issues of public or great general interest, not yet determined or settled by the Supreme Court of Ohio.

6. The Supreme Court of Ohio thereafter, issued a second order declining to exercise or grant its constitutionally mandated discretionary jurisdiction of appeal to plaintiffs, upon plaintiffs' Motion For Reconsideration filed with that Court, notwithstanding that plaintiffs had contended therein, inter alia., that Am.Sub.H.B. No. 350 unconstitutionally denied the plaintiffs due process under the Ohio Constitution and the 14th amendment U.S. Constitution, had violated the separation of powers doctrine and that the Ohio Legislature's action had denied plaintiffs simple justice and fundamental fairness by changing the rules in the middle of the litigation in favor of the State of Ohio and its political subdivisions, who were the target defendants of the plaintiffs.

7. Plaintiffs say, that as to their particular suit, the State of Ohio statutorily waived its sovereign immunity and agreed to have its liability to plaintiffs adjudicated in the Court of Claims in accordance with the rules of law applicable to suits between private parties, thereby both relinquishing and waiving any right the State of Ohio may have, to decide the outcome of its case and controversy with the plaintiffs, by legislative enactment of the Ohio Legislature or otherwise, and

further subjecting the State of Ohio to the recognized customary substantive and procedural due process available and regularly afforded to private citizens in all other Ohio Courts by the Ohio Judiciary in compliance with the 14th Amendment to the U.S. Constitution and Ohio's Constitution that incorporates the identical concepts. 8. Plaintiffs bring this **42 U.S.C. § 1983** action against all of the above named defendant legislators, in their individual capacity, in that they knowingly, intentionally, maliciously and with wilful or wanton reckless disregard for the civil rights of the plaintiffs, acted under color of law, to damage the plaintiffs in their suit against the State of Ohio, by acting judicially through the enactment of Am.Sub.H.B. No. 350, that repealed certain language in Ohio statutes, relevant to the facts of plaintiffs' cases, that plaintiffs had relied upon both as a basis of the State's tort liability and in their Memorandum In Support Of Jurisdiction, to establish that the issues presented thereby, were issues of public or great general interest, jurisdictionally qualifying plaintiffs for a discretionary appeal in the Supreme Court of Ohio.

9. Plaintiffs say that those ultra vires judicial acts of the defendants, thereby preempted the Supreme Court of Ohio from its being able to invoke its constitutionally mandated discretionary jurisdiction, that authorizes the Supreme Court of Ohio to exercise its jurisdictional discretion in the granting of an appeal in cases such as the plaintiffs, only when plaintiffs' Memorandum In Support Of Jurisdiction raises and presents issues of public or great general interest, thereby pursuant to 42 USC § 1983, depriving plaintiffs of their rights to equal

protection, due process and the privileges or immunities of the 14th Amendment to the U.S. Constitution and the privileges or immunities of Article IV, § 2, to come to the seat of government to assert any claim plaintiffs may have upon that government to the fullest extent provided by law.

10. Plaintiffs say that both the syllabi and parts of the opinion of the Supreme Court of Ohio in the Sheward case, supra., contain the same and/or similar contentions made earlier by the plaintiffs in their motion for reconsideration of their Memorandum In Support of Jurisdiction in their wrongful deaths and personal injuries actions they had filed and submitted to the Supreme Court of Ohio, that inferentially evidences that the Court did not have the jurisdiction to grant a discretionary appeal to plaintiffs because of the enactment of Am.Sub.H.B. No. 350, by the defendants herein.

11. Plaintiffs say that the defendants' enactment of Am.Sub.H.B. No. 350, was in excess of their stated legislative authority delegated to them under the Constitution of the State of Ohio and was unlawfully used by defendants to nullify the substantive and procedural statutory waiver by the State of Ohio to have its liability determined in accordance with the rules of law applicable to suits between private parties, that adversely affected plaintiffs' cases that were pending before the Supreme Court of Ohio.

12. R.C. § 2743.02(A)(1), provides in part:

> The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the

> rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations of this chapter and,....

The exception, that the determination of liability is subject to the limitations of this chapter is not in any way legally relevant to plaintiffs' claims.

13. The enactment of Am.Sub.H.B. No. 350, mooted and removed the plaintiffs' jurisdictional issues of public or great general interest, detailed in their Memorandum in Support Of Jurisdiction, disqualifying it as coming within the ambit of § 2, Article IV(B)(2)(d), of the Ohio Constitution's jurisdictional authority to the Supreme Court of Ohio to grant the discretionary appeal plaintiffs sought, thereby depriving them of a meaningful hearing of said Memorandum before the Supreme Court of Ohio to which they were entitled, as part of their U.S. & Ohio constitutional guaranteed right to a due process hearing on their discretionary appeal before and with the Supreme Court of Ohio.

14. Plaintiffs have a legitimate claim of entitlement to a vested property interest in the legal actions they litigated in the Court of Claims pursuant to R.C. § 2743.02(A)(1), that equitably and judicially estops and precludes the State of Ohio, including its Legislature, from taking official action of any kind whatsoever, that would alter the rules of law and the course of the adjudication of plaintiffs' litigation with the State of Ohio that deviated in any manner whatsoever, from the rules of law applicable to adjudications between private parties.

15. Plaintiffs' right to sue their State was originally granted, vested and reserved to them in the 11th Amendment of the U.S. Constitution, but removed by the federal judiciary as a legal fiction; thereafter, at all times relevant herein, plaintiffs had the reasonable expectation, stemming from the Ohio Constitution, that their right to sue the State of Ohio was a vested, fundamental, civil right that included having the complete due process of the State totally intact and available to plaintiffs, during the course of their suit and litigation against the State of Ohio in the Court of Claims of Ohio, the Court of Appeals of Franklin County and Supreme Court of Ohio for the purposes of obtaining a monetary judgment of damages for their personal injuries and statutory wrongful death actions.

16. These fundamental vested rights are not, and were not, otherwise subject to divestiture, either directly, indirectly or through the subterfuge of the Ohio Legislature usurping Ohio judicial power and acting judicially, so as to alter the outcome of plaintiffs' cases once the plaintiffs duly brought their suit in the Court of Claims of Ohio against the State of Ohio, inasmuch as, inter alia., private parties are not so similarly empowered to take such legal action unilaterally.

17. The foregoing action taken by Count I defendants, acting under color of law, is inter alia., an unconstitutional taking of plaintiffs' property and liberty rights without just compensation, under the Fifth and Fourteenth Amendment to the U.S. Constitution, by the State of Ohio, for inter alia., the public purpose of protecting the State Treasury from exposure to the potential money judgments arising from plaintiffs' vested property rights and vested legal interests in their

wrongful deaths and personal injuries suits against the State and its political subdivisions, that originated in the Court of Claims of Ohio.

18. The notion of fundamental judicial fairness, that no private party litigant has the legal right to unilaterally change any controlling, statutory law applicable to the controversy between such private party litigants, during the course of that litigation, is implicit in R.C. § 2743.02(A)(1), the 1975, statutory representation wherein the State statutorily waived its sovereignty and agreed to have its liability adjudicated in accordance with the rules of law applicable to suits between private parties.

19. R.C. § 2743.02(A)(1), was the long delayed, substantive, enabling legislation of plaintiffs' civil right to sue the State, under Article I, § 16, of the 1912, Ohio Constitution, all of which forms and is part of the substantive and procedural due process rights, equal protection of the laws rights, privileges and immunities rights under the Fifth & Fourteenth Amendments to the U.S. Constitution, and the privileges and immunities rights of Section 2, Article IV thereunder.

20. Plaintiffs say that all U.S. Constitutional rights, including the foregoing, were equally available as a matter of law, to both the plaintiffs and to the State as parties, in their earlier litigation originating in the Court of Claims, that was adjudicated in accordance with the rules of law applicable to suits between private parties, but that when that litigation reached the Supreme Court of Ohio, the defendants acted judicially, under color of law, on behalf of the State in its role

as sovereign, denying all of the above to the plaintiffs, to the plaintiffs' damage.

21. Am.Sub.H.B. No. 350, deprived plaintiffs of a due process hearing in the Supreme Court of Ohio to have meaningful considerations of plaintiffs' issues of great or general public interest, outlined in their Memorandum In Support of Jurisdiction, that would have and could have been fully considered and weighed by the Court, but were not, in that upon enactment the Supreme Court of Ohio was compelled as a matter of law, to take immediate judicial notice of that self-serving legislation, depriving plaintiffs of their legal right to a meaningful and fair opportunity to have plaintiffs' cases heard on appeal on the merits by that Court.

22. Plaintiffs say that as a matter of law, defendants are charged with actual as well as constructive knowledge and notice, that at the time of their enactment of Am.Sub.H.B. No. 350, that plaintiffs' cases against the State of Ohio and certain of its political subdivisions, were under consideration and briefed before the Supreme Court of Ohio, for the reason inter alia., that the Attorney General of the State of Ohio was defending the case.

23. Defendants are as a matter of law, charged with both actual, as well as constructive knowledge and notice, that plaintiffs were relying upon certain Ohio statutes to support their claim for appellate jurisdiction and reversal of their case in the Supreme Court of Ohio, for the reason inter alia., that the Attorney General of the State of Ohio was defending the case.

24. Plaintiffs say, that defendants are charged with the actual and constructive knowledge and notice detailed in paragraphs 22 & 23 preceding, for the additional reason, that Betty Montgomery had in her office assigned particular staff Assistant Attorney Generals, for the special purpose and duty of advising and counseling these defendants of the 121st General Assembly of Ohio, with respect to the law and the legality of the Ohio Legislature's proposed legislative enactments, and more especially Am.Sub.H.B. No. 350.

25. Plaintiffs say, that because the Attorney General was defending the State of Ohio in the Supreme Court of Ohio against plaintiffs' legal claims, that plaintiffs have probable cause to believe that as a matter of fact, all the defendants, some of whom were attorneys and charged with knowledge of constitutional law, were counselled by the Attorney General or her staff persons as to the statutory basis of plaintiffs' legal claims and the possible financial exposure to the State of Ohio that the Legislature would have to pay in damages, should the State of Ohio lose the pending cases, as well as to the constitutional consequences posed by the proposed enactment of Am.Sub.H.B. No. 350.

26. Plaintiffs say, that should the Court grant plaintiffs a remedy in tort in this case, that it give plaintiffs reasonable opportunity to prepare; and

27. That the Court authorize the plaintiffs to establish and introduce into evidence the State of Ohio's and its political subdivisions', the Township of Somerford's and the County of Madison's, liability and damages to the plaintiffs for their wrongful deaths and personal injuries; and

28. That the Court authorize plaintiffs to establish and introduce into evidence that their suits were meritorious and would have otherwise succeeded on the merits of their appeals to the Supreme Court of Ohio, had they been heard; and

29. That the Court authorize plaintiffs to introduce into evidence, evidence of the settlement and trial value of plaintiffs' monetary damages and probability of a successful trial outcome, following the remand of plaintiffs' cases for the trial; and

30. That the Court grant plaintiffs the right to establish the liability and damages they sustained, as if the outcome of their personal injury and deaths cases were a result of the legal malpractice of the defendants, using the relevant Ohio law applicable thereto, as a consequence of the Attorney General's dual involvement with the Count I defendants, and her legal defense of the State in the Supreme Court of Ohio of the wrongful deaths and personal injury case, brought by Plaintiffs against the State.

31. Plaintiffs say that as a direct and proximate legal result of the foregoing judicial acts of all of the defendant legislators, acting in concert or omitting to act in concert, the Supreme Court of Ohio was legally compelled to take judicial notice of their legislative enactment, Am.Sub.H.B. No. 350, that was legally imbued with the presumption of constitutionality and regularity; and

32. That the Supreme Court of Ohio was caused to further recognize in examining and evaluating plaintiffs' Memorandum In Support Of Jurisdiction, that this legislation, Am.Sub.H.B. No. 350, repealed the statutory predicate upon

which plaintiffs were relying, legally mooting plaintiffs' issues that they had asserted and were contending, qualified as issues of public or great general interest, thereby removing the Supreme Court of Ohio's constitutional, jurisdictional right to grant plaintiffs a discretionary appeal hearing, and as a matter of law compelling the Court to deprive plaintiffs of their discretionary appeal to its Court.

33. Plaintiffs say their Memorandum In Support of Jurisdiction qualified for a discretionary appeal before the Supreme Court of Ohio in that plaintiffs presented facts, statutes and cases in that Memorandum that substantially contradicted the legality of the summary judgments and appellate court affirmance below of their cases, that had decided plaintiffs' cases on substantial legal principles evolving from cases dealing with the sovereignty of the State of Ohio and its political subdivisions, and not upon legal principles of law applicable to private party adjudications.

34. Plaintiffs say that the Supreme Court of Ohio, in the ordinary course of judicial business, would have with reasonable judicial certainty accepted plaintiffs' case for appellate review as part of the Court's function and policy, to settle the unsettled state of the law presented from plaintiffs' cases, that was at issue in plaintiffs' Memorandum In Support of Jurisdiction.

35. The Supreme Court of Ohio with reasonable legal and/or judicial certainty would have reversed the judgments of the Courts below, and remanded plaintiffs' cases for trial, where, if not settled, upon trial would have resulted in a substantial award of damages against the State of Ohio and its

political subdivisions.

36. The action of all of the defendants, in enacting Am.Sub.H.B. No. 350, was to subvert the Ohio judicial process by specifically repealing the statutory language plaintiffs were relying upon for the granting of their discretionary appeal in the Supreme Court of Ohio, and to unilaterally change the substantive law applicable to their cases, leaving plaintiffs without the availability of any other legal recourse or remedy at law to redress their right to damages for the injuries and deaths they sustained.

37. These legislative repeals were specifically directed at plaintiffs, for the purpose of denying them their procedural due process rights to a discretionary appeal, and to further injure them in their substantive due process rights, by denying to them in their cases pending in the Supreme Court of Ohio, the rules of law available to private party adjudications to establish the State's legal liability and plaintiffs right to damages.

38. Plaintiffs sustained wrongful deaths and personal injuries as a consequence of an unsuitable guardrail that was protecting a man made wash bank, leading to a bridge on interstate highway I-70 that was constructed by the State of Ohio's agency, the Ohio Department of Transportation.

39. Plaintiffs' legal theory of guardrail liability was based, in part, upon the State of Ohio's statutory delegation to its County political subdivisions, that imposed upon the County the legal duty to maintain suitable guardrails at bridges in their respective County where a wash bank meets a public highway, and imposed statutory liability upon the County,

legal liability for damages caused to those persons injured or killed by the Counties' failure to do so. See R.C. § 5591.36 & R.C. § 5591.37, (pre October 1996), as detailed in "Exhibit B", a copy of which attached hereto, and incorporated by reference as though fully rewritten herein.

40. Plaintiffs had contended in the earlier litigation and still contend, that R.C. § 2743.02(A)(1), the State's statutory waiver of sovereign immunity and agreement to have its liability determined by the rules of law applicable to adjudications between private parties, subjects the State, as a statement of its public policy and delegation of duties and liabilities to its Counties, pursuant to R.C. § 5591.36 & R.C. § 5591.37, (pre October 1996), to the legal interpretation by the settled Ohio law of principal & agent and nondelegable duties.

41. The State, as a principal, lawfully delegated its nondelegable duty under R.C. § 5591.36 & R.C. § 5591.37, (pre October 1996), to its agents, the Counties, and imposed the same legal duty and liability upon the Ohio Department of Transportation, ("ODOT"), a State agency, by virtue of the public policy contained in those statutes, but the State became liable when ODOT undertook the building and construction of the I-70 bridge, its wash bank, the accident site guardrail, and the I-70 highway in 1970, in the County of Madison, Ohio and failed to install a suitable guardrail that became one of the proximate causes of personal injuries and deaths to the plaintiffs and plaintiffs' decedents in 1992, thereby making the State liable to plaintiffs for breaching its nondelegable duty as principal for the acts of its agents, under private party law.

42. The State's lower courts sustained the State's

liability for tort, as being limited at law to accidents that occur only on the paved portion of the highway, refusing to rule that the State's delegation to Ohio Counties, of statutory liability for unsuitable guardrails at wash banks, where they meet the public highways, makes the State liable, when a State agency goes into an Ohio county and builds such an unsuitable guardrail.

43. Sovereign immunity, otherwise legally reserved by the State of Ohio for its political subdivisions by statute, had been waived by the State of Ohio, when it statutorily permitted its Counties to be sued and liable in damages for tort for the existence of an unsuitable guardrail by a wash bank where it met a public highway, R.C. § 5591.36 & R.C. § 5591.37, (pre October 1996), and was waived when the State statutorily permitted all political subdivisions, that included both counties and townships to be sued and liable for their failure to keep public highway and public grounds free from nuisance R.C. § 2744.02(B)(3), (pre October 1996).

44. Sovereign immunity having been statutorily waived by the State of Ohio, wherein it agreed to have its liability adjudicated by the same rules of law applicable to private parties, if sued in the Court of Claims of Ohio, thereby became liable to plaintiffs as a matter of substantive law, for the State's own tortious action and behavior, (as that is the law applicable to private parties), upon evidence plaintiffs had presented in the Court of Claims, establishing that the Department of Transportation had violated the public policy of the State of Ohio in 1970, by building the I-70 wash bank, by building the I-70 bridge where the wash bank met the I-70

public highway that it had built, and then by constructing an "unsuitable guardrail" at that site, that failed to serve the safety function it was designed for, that caused damages to plaintiffs, thereby negating the summary judgments rendered against plaintiffs, it being an issue of material fact if the State had produced evidence of the accident site guardrail's suitability, under the leading case of Taylor v. Cincinnati, (1944), 143 Ohio St. 426,

45. The guardrail was prima facie "unsuitable", in that it failed to fulfill its statutory safety function of preventing motorists, including plaintiffs' driver, from accessing the wash bank and the creek below, because the guardrail was of insufficient length and lacked appropriate curvature, and it was therefore unable to prevent the motor vehicle that plaintiffs were passengers in, from travelling and passing immediately inside and parallel to the guardrail and falling precipitously into the creek below, over the wingwall bridge abutment that formed a man made wash bank.

46. Plaintiffs say that the long standing doctrine of sovereign immunity for torts occurring on public highways of the State of Ohio and its political subdivisions has resulted in Ohio courts strictly construing all statutes and concepts of tort liability against all plaintiffs, and in favor of the State and its political subdivisions, as is reflected in a long line of cases and case law that has and continues to limit their liability.

47. Plaintiffs say as a consequence of continuous legislation, litigation and development of the law, strict construction was no longer applicable as a matter of substantive law to plaintiffs' case, that had accrued in 1992,

that originated in the Court of Claims against the State of Ohio, because the State of Ohio's statutory waiver of sovereign immunity as to itself, subjects the State to the settled Ohio law of principal & agent and nondelegable duties, that contain the rules of law applicable to adjudications between private parties, and is recognized by Ohio Courts as controlling the legal relation between the State and its political subdivisions, in which the State has statutorily reserved the sovereign immunity doctrine for its political subdivisions.

48. As a matter of law, the State's relations with its political subdivisions are one of principal and agent, and its statutory waiver of sovereignty immunity in the Court of Claims of Ohio where the State adjudicates against the plaintiffs based on the rules of law applicable to private parties, equitably and judicially estops the nondefendant State of Ohio and defendants from denying the State's liability as principal, for the acts, duties and liabilities it statutorily delegated to its agents, the political subdivisions of Ohio, containing the public policy of the State, and from using its statutory reservation of sovereign immunity for its political subdivisions to deny its liability as principal with respect to its statutory waiver of sovereign immunity.

49. Plaintiffs say that as a consequence of paragraphs 37 & 38 above, the nondefendant State of Ohio as a matter of law, and the defendants in this case, are equitably and judicially estopped from representing to the Courts of Ohio in their defense by asserting and contending, that the line of adjudicated cases and case law that formerly limited the State of Ohio's tort liability to only the paved portion of the roadway

as a defense to its liability to plaintiffs is still viable, plaintiffs having the legal right to rely upon the Ohio rules of law applicable to adjudications between private parties as the basis for their equitable estoppel claims throughout this complaint.

50. Plaintiffs say that the nondefendant State of Ohio as a matter of law, and the defendants in this case, are equitably and judicially estopped from denying as a matter of law, that the State of Ohio is tortiously liable for constructing and maintaining the accident site guardrail, upon plaintiffs' prima facie evidence that it was unsuitable for the safety function it was intended to perform in accordance the State of Ohio's statutory mandate.

51. Plaintiffs say that the nondefendant State of Ohio as a matter of law and the defendants in this case are judicially estopped from denying as a matter of law, that it remains primarily liable as a principal for the plaintiffs' accident site guardrail it caused to be constructed by the State's agency, since it is a nondelegable duty under the law of principal and agent coupled with the legal doctrine predicated upon the well settled principle of law, that each private person or party is liable at law for his, her or its own torts.

52. Plaintiffs say that the nondefendant State of Ohio and the defendants in this case are equitably and judicially estopped from denying, that as a matter of law, that the plaintiffs' driver was not in any way negligent for his sudden, unexpected, involuntary loss of consciousness that may have expressed itself in his falling asleep at the wheel, unless they are able with additional probative evidence to show that his accident was due to and proximately caused by an act

recognized at law as being negligent and/or intentional.

53. Plaintiffs were at all times relevant herein, citizens of the State of Ohio and of the United States of America as were plaintiffs' decedents, except that plaintiff Guy Cavaliere was first ordered and reported to active duty on January 1, 1997 at Fort Sam Houston, at San Antonio, in the State of Texas, U.S.A. for basic training, and thereafter to the State of Georgia by the U.S. Army, where he first became a resident and citizen of the State of Texas, and thereafter became a resident and citizen of the State of Georgia with his plaintiff minor children, Maria and Joanna Cavaliere; his January 1, 1997 order to active duty occurring before the Supreme Court of Ohio ruled on plaintiffs' motion for reconsideration of their Memorandum In Support Of Jurisdiction.

54. Plaintiff, Guy Cavaliere, alleges that he was denied the privileges and immunities of Section 2, Article IV of the United States Constitution and that he was discriminated against and damaged by the defendants in his fundamental civil rights by denying him the right to come to the seat of government to assert and be heard to the fullest extent allowed by law as to his claim that he had or may have had, upon the State of Ohio and its political subdivisions, as described throughout this complaint.

55. All Plaintiffs and plaintiffs' decedents were party plaintiffs, in an action brought against the State of Ohio as party defendant, that was originally and timely filed in the Court of Claims of Ohio in Franklin County, Ohio as Case No. 94-07926 for damages sustained by the wrongful deaths of

Cynthia Ann Cavaliere, Jennifer Kniskern and Felina Cavaliere and personal injuries sustained by plaintiffs' Felina Cavaliere, Maria Cavaliere and JoAnna Cavaliere stemming from the June 13, 1992 motor vehicle accident on Interstate 70 in the Township of Somerford, County of Madison, State of Ohio.

56. Plaintiffs and plaintiffs' decedents were required by Ohio law, initially, to split their action for wrongful death and personal injury damages against the County of Madison and the Township of Somerford, political subdivisions of the State of Ohio as well as its joint and concurrent tortfeasors, by filing part of plaintiffs' action against the political subdivisions separately in the Court of Common Pleas of Cuyahoga County, Ohio, Case No. 272015, for the reason that the Ohio Court of Claims under Ohio statutory law did not have original jurisdiction with respect to a tort action against the political subdivisions.

57. Nonetheless, that action was subsequently removed from the Cuyahoga Common Pleas Court prior to any adjudication, at the instance of one of the political subdivision tortfeasors, to the Court of Claims of Ohio in Franklin County and was assigned Case No. 95-02901-PR, in accordance with R.C. § 2743.03(E)(1) & R.C. § 2743.03(E)(2) a special Ohio venue removal statute, that is unconstitutional, in that, the Court of Claims and the Franklin County Court of Appeals, 10th Appellate District, applied a different substantive rule of law in favor of a private party defendant and against plaintiffs, in their removed case, that concluded plaintiffs' action against that defendant, when the identical, controlling, substantive law

that existed in the Cuyahoga Court of Appeals, Eighth Appellate District of Ohio, was otherwise in favor of the plaintiffs.

58. Case No. 95-02901-PR was heard in conjunction with the plaintiffs Court of Claims of Ohio, Case No. 94-07926 against the State of Ohio that arose from same set of facts for which the Court of Claims had original jurisdiction.

59. Plaintiff James Kniskern is now a fully retired employee of the United States of America having worked two years with the Internal Revenue Service in the Department of Treasury and 27 years of consecutive employment with the Defense Financial Accounting Services in the Department of Defense, both agencies of the U.S.A.

60. James Kniskern is and was at all times relevant herein, the duly appointed administrator through the Probate Court of Geauga County, Ohio of the estates of Cynthia Ann Cavaliere, Case No. 94PE000203, Jennifer Kniskern, Case No. 93PE000281 and Felina Cavaliere, Case No. 94PE000202 for the purpose of acting as personal representative to bring wrongful death actions and a survivor action for the benefit of their estates and/or wrongful death beneficiaries. He brings this suit against the defendants herein in that capacity as well as in his individual capacity.

61. James Kniskern was plaintiff both in his individual and his official capacity as Administrator and personal representative in Case No. 95-02901-PR and Case No. 94-07926 in the Court of Claims for the three wrongful deaths actions and one survivor action for whom he was appointed administrator.

62. James Kniskern is the husband of JoAnn Kniskern. They are and were the natural parents of Cynthia Ann Kniskern, their married daughter; and Jenniffer Kniskern, their minor unmarried daughter; and the natural grandparents of Felina, Joanna and Maria Cavaliere their beloved grandchildren.

63. The plaintiff, Guy Cavaliere M.D., on September 30, 1993 enlisted in the U.S.Army Active Duty Reserves with the rank of Captain. On January 1, 1997 and thereafter to the present time he has been on active duty as a Major in the Medical Corps of the U.S. Army, currently serving as Chief of Anesthesiology at Martin Army Community Hospital at Fort Benning, Georgia, U.S.A.

64. The plaintiff, Guy Cavaliere, was the husband of his wife Cynthia Ann Cavaliere; the brother-in-law of Jennifer Kniskern; and the natural father of his three daughters Felina Cavaliere, Maria Cavaliere and Joanna Cavaliere all of whom were issue of that marriage and minors at the time of the accident that occurred on June 13, 1992 in which Cynthia Ann Cavaliere and Jennifer Kniskern were killed, with Felina Cavaliere sustaining mortal injuries, dying two weeks later in a hospital; and Maria Cavaliere and Joanna Cavaliere both sustaining serious personal injuries some of which are permanent.

65. Plaintiff Guy Cavaliere in the Case No. 95-02901-PR and Case No. 94-07926 in the Court of Claims, was a separate party plaintiff in his own right, and was an additional party plaintiff, as father and next friend on behalf of his minor children, Maria Cavaliere and Joanna Cavaliere, the latter

residing with her father in the State of Georgia, U.S.A., and Maria Cavaliere, no longer a minor, currently resides in the city of Chardon, County of Geauga and is a citizen of the State of Ohio.

66. Though the cases were litigated together, they were not legally consolidated in the Court of Claims of Ohio and resulted in separate summary judgments in favor of the defendants' State of Ohio, Department of Transportation, and a separate summary judgment in favor of the County of Madison and Township of Somerford.

67. These summary judgments were affirmed in a consolidated appeal adjudicated in the Franklin County Court of Appeals, 10th Appellate District of Ohio.

68. Plaintiffs then seasonably exercised their rights of further appeal of both cases that had been combined for that purpose by invoking the appellate jurisdiction of the Ohio Supreme Court in its Case No. 96-1861 by filing their Memorandum In Support of Jurisdiction, wherein they stated the required constitutional jurisdictional predicate that required the factual and legal issues presented be of public or great general interest and/or involves a substantial constitutional question as required by Ohio's Constitution Section 2(B)(2)(e), Article IV, and thereby qualified their cases in conformity with the constitutional, discretionary appellate jurisdiction requirements of the Supreme Court of Ohio.

69. Plaintiffs for their 42 U.S.C. § 1983 action against defendants state that Plaintiffs were entitled, as a matter of well settled procedural law of Ohio, to have a meaningful hearing and decision on their Memorandum in Support of

Jurisdiction pending before The Supreme Court of Ohio for the purpose of obtaining a discretionary appellate review and hearing of their cases by that Court.

70. Notwithstanding, that under the Constitution and laws of the State of Ohio the defendants were empowered and duly authorized to prevent or aid in preventing the denial of equal protection and due process of the laws and Constitution of the United States to the plaintiffs in their suit against the State of Ohio and its political subdivisions, yet the defendants nevertheless, willfully acting or omitting to act in concert, maliciously and/or with wanton or reckless disregard for the civil rights of the plaintiffs, acted in aid and the commission of those wrongs against plaintiffs to their damage.

71. Plaintiffs say that the Attorney General for the State of Ohio was permitted to intervene as a party intervenor on behalf of the State of Ohio and did actively defend on its behalf the constitutionality of Am.Sub.H.B. No. 350 enactment as a litigant in the case of The State ex rel. Ohio Academy of Trial Lawyers v. Sheward, supra, in the Supreme Court of Ohio, and that therefore, the defendants herein, did have a full and fair opportunity, with the Attorney General as their legal representative, to contest the issues of fact and law presented therein, that directly determined the issues leading to the Sheward syllabi, supra, with the Court's finding that the enactment of Am.Sub.H.B. No. 350, did not allow for any pretense of inadvertence, all of which was adjudicated in that case, by a valid final judgment with such determination being essential to that judgment.

72. The determination by the Supreme Court of Ohio

in the case of The State ex rel. Ohio Academy of Trial Lawyers v. Sheward, supra, as expressed in its syllabi 2 and 3 and the finding in its opinion from the circumstances of the Legislature's intention to do a judicial act as opposed to a legislative one, is conclusive as to the litigation sub judice under the modern view of res adjudicata, that embraces the doctrine of collateral estoppel, resulting in the defendant legislators, in their individual capacity, as a matter of law equitably and judicially estopped and precluded from relitigating the issues of that case with the Plaintiffs, though the plaintiffs were not parties to that case.

73. Consequently the defendant legislators are not as a matter law, entitled to qualified immunity for their ultra vires judicial act in this case and therefore as a matter of law defendants are equitably and judicially estopped from denying that they acted judicially in an ultra vires manner to usurp the judicial power of Ohio, in violation of the Ohio constitutional doctrine of separation of powers with respect to Am.Sub.H.B. No. 350, legislation.

74. The legislature defendants herein, are judicially estopped from asserting that they acted legislatively and are entitled to qualified immunity for their role in enacting AM.Sub.H.B. No. 350 with respect to plaintiffs action against them in this case.

75. Plaintiffs say that all of the statutes enacted, repealed or amended in toto or in part, by the defendants' passage of Am.Sub.H.B. No. 350, a general tort reform act, knowingly formed part of defendants' malicious modus operandi, so as to obfuscate and convolute the Ohio law, its

judicial processes and procedures of Ohio for the purpose of fragmenting, unsettling, and destructuring it, in part, to prevent plaintiffs from a meaningful hearing of their Memorandum In Support Of Jurisdiction, and in part, to injure Ohio trial lawyers, including plaintiffs' trial lawyer and Ohio judges at all levels in their profession, by making it impossible for them, though acting at the highest professional and intellectual level in good faith, to rationally integrate the Ohio law of torts on a cohesive, coherent basis and reach abiding legal decisions that justly settles both the tort law, as well as tort controversies.

76. Plaintiffs and their trial counsel, as a direct and proximate result of the foregoing acts of the defendants, were injured in their property rights represented in the anticipated damages they were seeking in the wrongful deaths and personal injury actions brought by them against the State of Ohio in its Court of Claims of Ohio and their United States 14th Amendment due process rights to a meaningful hearing at a meaningful time without the availability of any other legal recourse or remedy at law in Ohio.

77. Plaintiffs say that all of the statutes enacted, repealed or amended in toto or in part, by the passage of Am.Sub.H.B. No. 350, by the Ohio Legislature no longer exist as lawful statutes as a matter of law, following the August 16, 1999 decision of the Supreme Court of Ohio in the case The State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451 declaring it unconstitutional in toto.

78. R.C. § 109.36 was just such a statute, amended by Am.Sub.H.B. No. 350, that became inoperative as a matter of law from the date of the Sheward decision, supra.

79. Plaintiffs say that the now nonexistent R.C. § 109.36 is nonetheless embodied in,and absolutely necessary for the functioning of R.C. § 2743.02(F) that states:

> A civil action brought against a state officer or employee as defined in section 109.36 of the Revised Code, that alleges an officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

80. The Court of Claims of Ohio cannot now lawfully exercise its mandated judicial authority under R.C. § 2743.02(F), because of the failure of R.C. § 109.36 defining inter alia., as to who is a state officer, and because this statute is an integral and substantive part of R.C. § 2743.02(F), thereby rendering R.C. 2743.02(F) legally inoperative, and thwarting plaintiffs from bringing an action or this action in the Court of Claims where the State would pay the damages.

81. Plaintiffs say the results of defendants' actions stemming from their enactment of Am.Sub.H.B. No. 350, detailed paragraph 75 above, is the direct and proximate cause of plaintiffs damages: (1.) by creating a legal quandary under Ohio law that deprives plaintiffs of their right to sue the State

of Ohio's officers and employees in the Court of Claims for causes of actions arising from the facts of this case; and

82. That, (2.), by denying the plaintiffs' constitutional right of access to all Ohio Courts that are constitutionally required to be open to plaintiffs to give them a fair opportunity to vindicate their legal rights; and

83. That (3.), by denying plaintiffs their right to have all their causes of actions arising from the facts in this case decided at a meaningful time in a meaningful manner, in derogation of the due process clause of the 14th Amendment to the U.S. Constitution.

84. As a consequence of the foregoing paragraphs 77 through 80 inclusive, the defendants by failing to take prompt remedial action, after due notice of the Sheward decision, supra, perpetuated that legal impediment they created through their intentional, ultra vires, judicial acts and are thereby, equitably estopped and judicially estopped from asserting the statute of limitations as a defense in this case.

85. The defendants are equitably and judicially estopped from asserting the defense of the statute of limitations to plaintiffs' 42 U.S.C. § 1983 complaint as a matter of law, by plaintiffs pursuit of their bona fide moral claim that exists because plaintiffs were personally injured and killed by a State of Ohio constructed, guardrail instrumentality, and accrued as a result of the State and its political subdivisions legal exoneration from all liability to plaintiffs, in a final adjudication.

86. Plaintiffs' counsel on behalf of the plaintiffs, in good faith, sought to present their moral claim to the Ohio

Legislature and personally contacted Plaintiffs' State Representative Diane Grendell telephonically, to determine if she would be willing to intervene on behalf of plaintiff, James Kniskern, a citizen in her district, and introduce his moral claim to the Ohio Legislature.

87. Diane Grendell expressed her willingness to proceed and put plaintiffs' counsel in touch with her legislative aide, who then asked plaintiffs' counsel to forward to her by mail, the court opinions that qualified for a moral claim to her.

88. After plaintiffs' counsel had mailed in the requested documents he was advised by Diane Grendell's legislative aide to submit more detailed information and to forward the briefs and court opinions used in the adjudicated litigation to an attorney in the Statehouse for evaluation.

89. Time passed and the legislative bill was produced; it was forwarded by the legislative aide to plaintiffs' counsel; it detailed the basis of plaintiffs' moral claim against the State; it detailed how the moral damages were to be established in the Court of Claims of Ohio, and how those damages were to be paid by the State.

90. Plaintiffs' counsel by this time, because of the progress that had occurred, was totally relying upon State Representative Diane Grendell for guidance in obtaining damages for the plaintiffs through the introduction of the plaintiffs' moral claim legislation and had good reason to believe she would honor her earlier agreement to introduce the legislative bill into the legislature for committee hearing and hopefully passage.

91. Plaintiffs counsel, though continually pressing

State Representative Diane Grendell to honor her commitment and introduce plaintiffs' legislative bill, was continually put off and deferred filing plaintiffs' 42 U.S.C. § 1983 claim past the expiration of the 2 year statute of limitations, because in his judgment there was a reasonable expectation that plaintiffs' moral claim, having been truly articulated, recognized and acknowledged in the legislative bill, Exhibit A, drawn by the Legislative Service Commission at the request of a State Representative, that such a bill would not have been drawn nor issued if plaintiffs didn't have one.

92. Plaintiffs' counsel was further induced to defer filing plaintiffs' claim because in his judgment there was reasonable probability that the moral claim legislative bill would be enacted by the Ohio Legislature once the bill was introduced, by what plaintiffs' counsel perceived and had good reason to believe to be a moral legislature, composed of honorable men and women, worthy of respect that would, if not graciously honor plaintiffs bona fide moral claim, would have great difficulty in turning it down politically.

93. Plaintiffs' counsel, some time before the statute of limitations had run, sought and retained co-counsel whose credentials of political compatibility with State Representative Diane Grendell were impeccable, for the special purpose of having him assist in getting the legislative bill introduced.

94. Plaintiffs' co-counsel too, was led to believe by Diane Grendell that the legislative bill would be introduced soon, because he had sought out and obtained a co-sponsor in the House that she deemed necessary for both her introduction of plaintiffs legislative bill and its successful passage.

95. Plaintiffs say that though Diane Grendell continued to give assurances that she would introduce the bill and that it was in the offing, there came a point where it became apparent in September 1999 that she was persona non grata with the Ohio Legislature having brought her own suit in the Ohio Supreme Court against the Legislature because of some internal dispute.

96. Plaintiffs' counsel says that from September 1999, to the filing of this complaint he has diligently attempted to draft this complaint involving complicated legal and jurisprudential issues.

97. Plaintiffs say that the two year Statute of Limitations should not be determined by this Court, to have started to run from the date the Supreme Court of Ohio issued its order denying plaintiffs motion for reconsideration of their Memorandum In Support Of Jurisdiction on January 29, 1997, by finding that it was the date that the Plaintiffs knew or should have known they were legally injured by the Legislature or the date of June 27, 1997 when the U.S. Supreme Court denied their petition for writ of certiorari, when they no longer had any remedy at law available to them.

98. Plaintiffs plead in the alternative and say, that in establishing the date when plaintiffs' 42 USC § 1983 statute of limitations started to run as a matter of law, occurred when the plaintiffs' were charged with knowing that they were injured as a matter of law.

99. Plaintiffs had raised the issues of constitutional legislative injury in their motion for reconsideration in their Memorandum In Support Of Jurisdiction, but those

constitutional legislative injuries were not publicly acknowledged nor legally recognized at that time as such, by the Supreme Court of Ohio, thus, in effect informing plaintiffs that they were not injured at law.

100. The Supreme Court of Ohio's final denial of Plaintiffs' motion for reconsideration of their Memorandum In Support of Jurisdiction had a chilling effect upon both plaintiffs' and their trial counsel's ability to actually recognize and know, that as a matter of law they were injured by AM.Sub.H.B. No. 350, in that the Court's denial appeared and seemed to sanction the lawfulness of that Tort Reform Act.

101. Plaintiffs therefore say they could only be charged as a matter of law, with either actual or constructive knowledge of their 42 USC § 1983 constitutional legislative injury, when the Supreme Court of Ohio announced as a matter of law, in its decision on August 16, 1999, in the case The State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, that established that the Ohio Legislature had in fact, by enacting Am.Sub.H.B. No. 350, performed an ultra vires judicial act as plaintiffs had contended causing them injury.

102. Plaintiffs' moral claim legislative bill is marked for identification as "Exhibit A" a copy of which is attached and incorporated by reference as though fully rewritten herein; and

103. Plaintiff Major Guy Cavaliere M.D. has been continuously on active duty in the United States Army from January 1, 1997 to the time of filing this complaint and that by virtue of the Soldiers and Sailors Relief Act, 50 USCS Appx §

525, the two year Statute of Limitations of 42 U.S.C. S 1983 is tolled as to him.

104. Plaintiff Major Guy Cavaliere M.D. is a wrongful death beneficiary and a real party in interest under R.C. § 2125.01 et seq., in the deaths of his wife, child, and sister-in-law, and has a loss of services action for the personal injuries his children sustained that was part of the actions brought against the State of Ohio and its political subdivisions.

105. This complaint is being filed and action brought during the minority of the plaintiff, JoAnna Cavaliere, and therefore the two year Statute of Limitation of 42 U.S.C. § 1983 is tolled as to her.

106. Plaintiffs say that two year Statute of Limitation of 42 U.S.C. S 1983 is tolled as to all the plaintiffs, including James Kniskern the duly appointed administrator through the Probate Court of Geauga County of the estates of Cynthia Ann Cavaliere, Jennifer Kniskern, and Felina Cavaliere, for the reasons set forth in paragraphs 86 through 101 inclusive, that he was caused to refrain from filing this claim at an earlier time upon the reasonable expectation that having lost the litigation against the State of Ohio on liability that the State would honor plaintiffs moral claim and pay their damages, since it was both the State's unsuitable guardrail that damaged plaintiffs as well as the State of Ohio's enactment of Am.Sub.H.B. No. 350.

107. Plaintiffs' moral claim legislative bill, marked for identification as "Exhibit A", is attached hereto and incorporated by reference as though fully rewritten herein, was solicited by Plaintiffs' counsel for enactment by the Ohio

Legislature through plaintiff James Kniskern's, Ohio State Representative, Diane Grendell, who both by herself and her legislative aide represented to Plaintiffs' counsel, that such a legislative bill arising from all the circumstances alleged in this complaint, was absolutely necessary to the introduction and presentment of plaintiffs' moral claim to the Ohio Legislature; and

108. That the moral claim legislative bill was prepared at State Representative Diane Grendell's instance and request, by the Ohio Legislative Service or other attorneys employed by the Ohio Legislature, for introduction and passage by the Ohio Legislature as a moral claim and that a copy was delivered to plaintiffs' counsel at his request in 1997; and

109. That the proposed legislative moral claim bill, delivered to Plaintiffs' counsel from the Ohio Legislative Service, after detailing all the circumstances from the opinions of the Courts, did not contest the liability of the State of Ohio to plaintiffs, directing that the plaintiffs, upon presenting their damages to the Court of Claims of Ohio for determination, that the amount so determined would be paid by the State; and

110. Plaintiffs say they initially relied upon State Representative Diane Grendell's representation that she, by herself, would introduce the plaintiffs' moral claim bill to the Ohio Legislature, and thereafter plaintiffs relied upon her representation, that she, with a co-sponsor would introduce it; and

111. Plaintiffs had good reason to believe that their moral claim bill would be introduced, and that after a

legislative committee hearing, that it would be enacted as legislation, since the bill as drawn by State drafters recognized the validity of Plaintiffs' moral claim, and plaintiffs through their counsel believed that the bill is one that a fair minded legislature could abide and would pay, after the damages were determined by the Court of Claims; and

112. Plaintiffs say that some of the defendant Ohio legislators sued in their individual capacity are holding State legislative office in their official capacity at the present time; that they retain the official power to act on behalf of the State of Ohio with the power and authority to continue to further obstruct the Ohio judicial process and otherwise interfere legislatively with the litigation and adjudication of plaintiffs' 42 U.S.C. § 1983 proceedings against those legislator defendants, individually and John Doe I, II, & III defendants in this Court of Common Pleas, the Court of Appeals of Cuyahoga County for the Eighth Judicial District and the Supreme Court of Ohio and any other Ohio or U.S. federal district or appellate Court where this case may be venued.

113. Plaintiffs invoke the inherent power of the Judiciary to issue appropriate orders, sua sponte or otherwise, to protect plaintiffs and their trial counsel in their maintenance of this obviously politically incorrect but necessary suit, calling for legislative accountability, from any and all untoward retaliatory acts of the defendants that heretofore have made manifest, both directly or indirectly, and will probably continue into the indefinite future, that will cause plaintiffs or their trial counsel to be compromised in the adjudication of plaintiffs' claim herein.

114. Plaintiffs say that plaintiffs will otherwise be irreparably damaged and have no other adequate or available remedy at law or equity under Ohio law.

115. Plaintiffs say that as a direct and proximate result of the foregoing malicious and intentional unconstitutional conduct and unreasonably repressive and unlawful judicial acts of the defendants in conspiring together as alleged herein, plaintiffs were damaged financially in their property and civil rights and entitled to exemplary damages.

116. Plaintiffs have been required to hire the services of attorneys to prosecute this action, and therefore, recovery of attorney fees, as allowed by law and this court are demanded herein, or made as a direct award.

WHEREFORE Plaintiffs pray that this court and the Judiciary, wherever this case may become sub judice, exercise its inherent power and issue all appropriate orders, sua sponte or otherwise, as necessary, during the pendency of this action to protect plaintiffs and their trial counsel from the legislator defendants subverting the judicial process that plaintiffs are participating in, in their pursuit of their 42 U.S.C. 1983 claims and from taking overt or covert retaliatory action against their trial attorney.

Plaintiffs further pray for a judgment against each and all of the defendants both jointly and severally in a sum and an amount in excess of $25,000.00 that will fully and fairly compensate plaintiffs for the damages they sustained, including reasonable attorney fees in maintaining this and the earlier actions, the costs they incurred therein, punitive damages, and for any and all other relief they may be

otherwise entitled to at law or equity.

COUNT II

117. Now comes the Plaintiffs and for their second cause of action against the defendants' John Does I, John Does II and John Does III and incorporates all the allegations contained in Count I as though fully rewritten herein.

118. Plaintiffs say that all of the defendants in Count I were lobbied by both registered and unregistered professional lobbyists in the State of Ohio, being designated as John Does I defendants herein; and by John Does II, their principals, defendants herein; and those John Does III, defendants herein, who funded both John Does I's and John Does II's lobbying effort.

119. John Does I's, John Does II's, and John Does' III's, all of whom are the Count II defendants whose true names, identities or capacities, whether individual, corporate, associate or otherwise and addresses are presently unknown to plaintiffs, but are known to the defendants in Count I, and therefore plaintiffs sue the Count II defendants by such fictitious names as named in the caption of this complaint.

120. Plaintiffs are informed, believes and thereon alleges that each of the Count II defendants is responsible in some manner for the events and happenings herein referred to, that caused damages to plaintiffs, as herein alleged.

121. Whenever in this complaint reference is made to any act of Count II defendants, and each of them, such allegation shall be deemed to mean that the individuals,

officers, directors, agents and employees of the Count II defendants did or authorized such acts while actively engaged in the management, direction, control and employ of the affairs of the Count II defendants, and were acting within the scope of their employment and agency, and engaged in a joint or common enterprise.

122. Whenever in this complaint reference is made to any act of the Count II defendants, such allegation shall be deemed to mean the act of each defendant acting individually, jointly, in concert, and severally.

123. Plaintiffs say that the professional lobbyists, John Does I, their principals, John Does II, and those who funded their lobbying effort, John Does III, treacherously, maliciously with a wanton or reckless disregard for the civil rights of the plaintiffs induced all or some of the defendants in Count I to enact Am.Sub.H.B. No. 350, a tort reform act.

124. Am.Sub.H.B. No. 350, a tort reform act. was legislation designed to injure plaintiffs in their legal and constitutional rights, and targeted plaintiffs and their trial lawyer as a class. when those Count II defendants, knew or should have known, both from the advice and information furnished them by their principals, from those who funded their lobbying effort, as well as from previous decisions of the Supreme Court of Ohio, that the tort reform act, Am.Sub.H.B. No. 350, they had successfully lobbied the defendants in Count I to enact, was seriously flawed constitutionally.

125. Plaintiffs say that Count II defendants knew or should have known, when they lobbied Count I defendants, that there was a reasonable legal probability that the legislation

(5) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

JAMES KNISKERN, et al.,
Petitioners,

v.

RON AMSTUTZ, et al.,
Respondents.

On Petition for Writ of Certiorari
To the Ohio Supreme Court & Ohio Court of Appeals,
Eighth Appellate District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Vol. IV of IV
Pages 129- 155, P-R

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APPENDIX Q

STATEMENT OF ISSUES

(Appearing as part of Petitioners' Appellate Brief Supplementing their Assignment of Errors)

1.

Did The Common Pleas Court err in granting a summary judgment in favor of the defendant legislators holding that they were absolute immune on the basis of their legislative enactment, Am.Sub.H.B. No. 350, when the Court had before it the syllabus law of the Sheward decision which held that: "Am.Sub.H.B. No. 350 Usurps Judicial Power In Violation Of The Ohio Constitutional Doctrine Of Separation Of Powers and, Therefore, Is Unconstitutional In Toto"., by failing to find a 42 USC § 1983, liability exception under federal law under the Tenny decision which made clear that legislators usurpation of power subjected them to such a civil rights suit? (Assignment Error #1)

2.

Did the Common Pleas Court err in granting a summary judgment in favor of the defendant legislators once the Sheward decision found usurpation by failing to require the defendants to sustain their burden of proof to justify a summary judgment of dismissal by making a showing that the federal law applicable to plaintiffs' 42 USC § 1983 case, exonerates defendant legislators, sued in their individual capacity, who voted for Am.Sub.H.B. No. 350 and that the passage of Am.Sub.H.B. No. 350 did not by such usurpation

of judicial power, by operation of law, render plaintiffs' cases against the state and its political subdivisions, pending in the Supreme Court of Ohio upon plaintiffs' Memorandum In Support Of Jurisdiction, "de facto res adjudicata" their case by removing the Supreme Court Of Ohio's jurisdiction to grant plaintiffs a discretionary appeal under Article IV, § 2 (B)(2)(e), of the Ohio Constitution. (Assignment of Error #1)

3.

Did the Common Pleas Court err in granting a summary judgment in favor of the defendant legislators by failing to find that the enactment of Am.Sub.H.B. No. 350, usurping judicial power, legislatively, by operation of law, adjudicated plaintiffs' case, originating in the Court Of Claims, pending in the Supreme Court Of Ohio against the State, in the State's favor, was contrary to the law applicable to private parties, and violated Article I, § 10 of the U.S. Constitution, by impairing Ohio's statutory contract, R.C. § 2743.02(A)(1), with plaintiffs, depriving plaintiffs of the Equal Protection Of The Laws and their Due Process right to a meaningful hearing in a meaningful manner, appropriate to the nature of the case under the 14th Amendment to the U.S. Constitution? (Assignment of Error #2)

4.

Did the Common Pleas Court err, in denying plaintiffs Motion To Strike The Answers filed by the Attorney General of Ohio on behalf of the Defendant Legislators, by ignoring the controlling and preemptive law expressed in Hafer v Melo, Jr. (1991), 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed2d 301, that forbids State Treasury monies to be used for the defendant legislators' defense, in violation of plaintiffs' Due Process 14th Amendment U.S. Constitution rights? (Assgnt. of Error #3)

6.

Did the Common Pleas Court err in denying plaintiffs' Motion to strike the Attorney Generals' Answers finding by implication that the Attorney General has standing under federal law to defend the defendant legislators sued in their individual capacity? (Assignment of Error #3)

7.

Did the Common Pleas Court err in denying plaintiffs' Motion To Strike the Attorney Generals' Answers filed on behalf of the defendant legislators finding by implication that the Attorney General's privity with plaintiffs as to the cases against the State did not preclude the Attorney General from representing the defendant legislators sued in their individual capacity? (Assignment of Error #3)

8.

Did the Common Pleas Court err in denying plaintiffs' Motion To Strike the Attorney Generals' Answers, filed on behalf of the defendant legislators, without requiring a Motion To Intervene under Civ. R. 24 on behalf of the State where the Attorney General in those answers made no reservation of sovereign immunity on behalf of the State thereby making the State a real party in interest or "a person", for 42 USC § 1983 purposes? (Assignment of Error #3)

9.

In the context of the individual' due process liberty interest in freedom from arbitrary adjudicative procedures, when a person is deprived from the benefit of a judicial procedural rule of court, does due process start not with a judicial attempt to decide whether the rule created an "entitlement" that can be defined as "liberty" or "property," but with an assessment of what procedural protections are required in light of the governmental and private interests at stake? (Assignment of Error #4)

10.

Did the Common Pleas Court err in denying plaintiffs' Motion To Bifurcate for discovery purposes and then

summarily granting summary judgment in defendants favor when the Court was apprised that defendants' defense to discovery based upon privilege by virtue of the Speech and Debate Clause of the U.S and State Constitutions does not exist by virtue of U.S. Supreme Court adjudications? (Assignment of Error #1)

11.

Did the Common Pleas Court err in denying plaintiffs a partial declaratory summary judgment upon the law applicable to plaintiffs' 42 USC § 1983 damages, inasmuch as they are complicated, completely unsettled as a matter of law and judicial economy warrants there adjudication? (Assignment of Error #5).

APPENDIX R

APPELLANTS' MOTION FOR RECONSIDERATION TO THE OHIO SUPREME COURT

This Court is moved pursuant to SCt R XI § 2(A)(1) to reconsider its October 24th decision in this case, declining to grant a discretionary appeal for want of a substantial constitutional issue and grant Appellants a discretionary appeal for the following reasons.

A substantial constitutional question plainly surfaced when the Ohio General Assembly enacted S.B. 108. It became law on July 6, 2001 repealing Am.Sub.H.B. No. 350 and reviving the law as it existed prior to its enactment. It purported to conform to this Court's decision in State ex rel. Ohio Academy of Trial Lawyers v Sheward (1999), 86 Ohio St.3d 451. The General Assembly relied on, in part for the validity of S.B. 108, on the case of Weil v.Taxicabs of Cincinnati, Inc. (1942), 139 Ohio St. 198, 206, 22 O.O. 205, 208, 39 N.E.2d 148, 152 in which this Court stated:

> "The courts have generally held, notwithstanding this [current Section 15(D), Article II] and similar constitutional provisions, that where an act is amended, the part of the original act which remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions as having

become the law only at the time of the amendment" (cites omitted).

If the General Assembly is correct in relying on the above quote and S.B. 108 is given the presumption of constitutionality by this Court, then the General Assembly retroactively restored jurisdiction to this Court when it heard Appellants' original Memorandum in Support of Jurisdiction and Appellants' Motion for Reconsideration. Thus S.B. 108 seemingly renders Appellants' 42 U.S.C. 1983 claim in this case moot. That would be because the law with respect to private parties is subject to the changes in the law enacted by the General Assembly and because the State is no longer a party to this case in that Appellants have sued the defendant legislators in their individual capacity.

Appellants' claim in the underlying original case asserted that the defendant legislators had de facto, decided Appellants' case by the enactment of Am.Sub.H.B. No. 350. That enactment, it was asserted, removed this Court's constitutional jurisdiction to grant a discretionary appeal by removing the statutory predicate in Appellants' Memorandum In Support of Jurisdiction, that Appellants had contended raised a substantial constitutional question of public or great general interest. It deprived Appellants of their U.S. 14th Amendment Due Process rights to an entitlement ordinarily afforded others in this State. In that case the State of Ohio was a party defendant. Appellants were seeking a discretionary appeal from a decision in favor of the State that had been adjudicated in the Court of Claims

of Ohio.

When this Court denied Appellants a discretionary appeal in the underlying case, Appellants then filed their Motion for Reconsideration contending substantially that which this Court subsequently held in Sheward, supra, case. Appellants' motion unfortunately, was denied to Appellants by a 4 to 3 vote of this Court. Appellants attach that Motion for Reconsideration as "Exhibit A" and incorporate it by reference herein.

The right of the General Assembly to manipulate the law to the State's advantage when it is a party to suit originating in the Court of Claims, when Appellants were fully briefed before this Court on their Memorandum In Support of Jurisdiction, is and will always be, more than a gut blow below the belt, because it, respectfully, violates Article II § 28 of the Ohio Constitution as well as the U.S. Constitution, Article I § 10 by prohibiting states from impairing contracts. This Court is more than sufficiently able to protect the State's Court of Claims' contractual interest in such cases without the intervention of the General Assembly.

However, Appellants' 14th Amendment due process claim in the case sub judice did not originate in the Court of Claims of Ohio but originated in the Common Pleas Court of Cuyahoga County. The General Assembly may very well be able by legislative enactment to moot Appellants' 42 U.S.C. § 1983 case that claims that they were denied a meaningful hearing because the defendant legislators destroyed the Ohio Supreme Court's jurisdiction to hear Appellants' case and

circumvent Ohio's statutory contractual commitment to adjudicate their case in accordance with law applicable to private parties.

Appellants contend that S.B. 108 is prima facie presumed to be retroactive legislation because it expressly so states and by the application of R.C. § 1.48. Thus it is proper to analyze S.B. 108's operation as a violation Article II, § 28 of the Ohio Constitution because its legal effect is to further negate the quid pro quo of Appellants' case with the State, namely that Ohio's statutory law contractual commitment to Appellants that their Court of Claims case was to be decided by the law applicable private parties. That contractual commitment requires a judicial decision not a defacto legislative one.

Appellants rely on Johnson v BP Chemicals, Inc., (1999) 85 Ohio St.3d. 298 at pg. 303, 707 N.E.2d 1107 at pg. 1111, (which Appellants quote having deleted the interlineated case authorities cited therein), this Court stated:

> We do not dispute the long-standing principle that the General assembly has the authority, within constitutional limitations, to change the common law by legislation. We are also mindful of the fundamental precepts that all legislative enactments enjoy a strong presumption of constitutionality, and that the role of a court when considering the constitutionality of an Act is not to judge the wisdom of the legislation. However, these general principles are not absolute. Thus, when the validity of a statute is challenged on constitutional grounds, it is our duty

> to determine the meaning and effect of the constitution vis-a- vis the challenged legislation. Moreover, if the legislation at issue exceeds the limits of legislative power, we must protect the rights of the citizens effected by the law and, if appropriate, declare the legislation in valid.

Appellants contend S.B. 108 exceeds the limit of legislative power because it is a continuation of the usurpation of judicial power this Court found to be present in the enactment of Am.Sub.H.B. No. 350 as it declared in Sheward, supra, and for the same reasons. It patently violates the one subject rule because it so intimately intertwined with Am.Sub.H.B. No. 350 involving the same myriad of subjects and statutes

It is not entitled to the presumption of constitutionality. It does not qualify as legislation that moots the substantial constitutional issues raised of public or great general interest in Appellants' Memorandum in Support of Jurisdiction in the case at bar. Appellants attach as "Exhibit B", The Bill Analysis of the Legislative Service Commission of Sub. S.B. 108, and incorporate it by reference herein.

It may very well be that this Court has already concluded that Appellants' case is moot in reaching its October 24, 2001 decision. However, there is something diabolical and unrighteous in the recent passage on July 6, 2001 of S.B. 108 by the General Assembly that raises a substantial constitutional question of public or great general interest. It forms the predicate for Appellants' grounds for

reconsideration.

This Court knows via judicial notice of Civ R 44.1(A)(1) that the General Assembly in S.B. 108, repealed Am.Sub.H.B. No.350. It then in the same bill, reenacted by reviving all the statutes that theretofore existed as if Am.Sub.H.B. No 350 had not been passed, relying upon Article II, § 15(D) in the Ohio Constitution that provides:

> "No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed".

See page 12 "Exhibit B."

S.B. 108 purports to be remedial by reestablishing the legal statutory landscape prior to the decision in Sheward, supra. Sheward held that Am.Sub.H.B. No.350 was unconstitutional in toto and that it violated the one subject provision of the Ohio Constitution.

Appellants' contend that S.B.108 violates the one subject rule and is therefore unconstitutional. Appellants contend further that the enactment of S.B. 108 represents a continuous act by the defendant legislators in the General assembly of usurping the judicial power of the Court stemming from the enactment of Am.Sub.H.B. No. 350 to the present time. If Appellants establish probable cause herein that this so, then Appellants contend they have evidenced a substantial constitutional question of public or great general interest wherein this Court has jurisdiction to

grant a discretionary appeal to Appellants.

This is a daunting task, not only because S.B. 108 represents a welcome return to a tried and true statutory legal landscape, but because this Court has held in State v Thompkins (1996), 75 Ohio St.3d 558 at pg. 560 "[T]he legislation being questioned will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt."

How could any thinking person reasonably doubt, after this Court made it absolutely plainly clear in Sheward, supra, that this Court was enforcing the one subject rule with respect to Am.Sub.H.B. No. 350 because it involved over 100 statutes involving various subjects, -- that by reenacting and reviving through a replacement bill of over 100 statutes involving the very same various subjects and statutes,-- that such an enactment would not violate the same one subject rule – and that it therefore could be deemed and construed by this Court to be constitutional?

Revival of so many statutes in S.B. 108 directly connected to the same number of statutes that had been previously been specifically intertwined by amendment to Am.Sub.H.B. No. 350 in the same bill, is arbitrary and irrational in the context of Sheward, supra. It constitutes a deprivation of substantive due process under the Ohio and U.S. Constitutions.

The defendant legislators are reasonable thinking, but they are apparently committed to vindicate their legislative intent in Am.Sub.H.B. No. 350 one way or another for reasons Appellants attribute to "no fault lobbying" as

asserted by Appellants in the Court below. Obviously if S.B. 108 is deemed by this Court to be unconstitutional for violating the one subject rule of the Ohio Constitution, the defendant legislators will have succeeded in placing this Court in a position of enduring the chaos that accrues from the lack of true remedial legislation. Remedial legislation is and has been constitutionally required since the Sheward, supra, decision, but has not been forth coming. S.B. 108 has been intentionally enacted in bad faith.

The fault does not rest so much with the defendant legislators as it does with the lobbyists and their principals who undoubtedly financially secured the "no fault lobbying" commitment from them. These lobbyist and their principals are not entitled at law to lobby for ultra vires legislation that usurps the judicial authority of this Court in such a way that the political subdivisions of the State of Ohio are consequently and unconstitutionally denied their statutory delegated police power.

Plaintiffs-Appellants in the Court of Appeals argued that the defendant legislators were continuing to usurp the judicial authority of the Ohio Supreme Court following the Sheward decision in August of 1999 by failing to seasonably enact remedial legislation by the spring 2001. A reasonable inference should be drawn from the lack of remedial legislation that the quid pro quo between the lobbyists and the defendant legislators was "no fault lobbying" whereby the legislators would not enact remedial legislation if Am.Sub.H.B. No. 350 failed to pass constitutional muster. Either way the lobbyists obtained their

desired goal.

Appellants pointed out in the Court below out that the usurping of judicial power necessitating the Sheward decision resulted in an unconstitutional divestment of the State of Ohio's police power, e.g. R.C. 723.01. Thereafter in July 2001, the General Assembly enacted S.B. 108 that repealed Am.Sub.H.B. No. 350 and reinstated the entire law as it existed prior to the enactment of Am.Sub.H.B. No. 350 and seemingly restored the State's police power. If S.B. 108 is unconstitutional as contended, the State's political subdivisions are still unconstitutional denied their statutorily delegated police power.

Even if this Court is not disposed to adjudicate Appellants' case for whatever reason, it should nonetheless grant a discretionary appeal for the limited purpose of vindicating its own judicial authority by requiring the defendant legislators to show cause why they should not disgorge the proceeds from the lobbyists and their principals that they received both directly and indirectly for their ultra vires acts in passing Am.Sub.H.B. No. 350 and S.B.108 that Appellants contend usurped the judicial authority of this Court.

This legislative action of these defendants is a breach of the fiduciary duty they owe to the State as well as the Appellants. The Attorney General representing these defendants should be ordered to file an accounting with the Court in regard thereto and the moneys paid into the State treasury.

As stated in Scheuer v. Rhodes (1974) 416 U.S. 232

at pg. 237 , 94 S.Ct. 1683 at pg. 1686:

"Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he comes into conflict with the superior authority of that Constitution, an he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States,"

In Pennhurst State School & Hospital v. Halderman, (1984) 465 U.S.89 at pg 153, 104 S.Ct. 900 at 936, Judge Stevens in his dissent extensively reviewed the law of ultra vires and sovereignty with respect to the liability of public officials. He stated:

- "That the doctrine of sovereign immunity does not protect conduct which has been prohibited by the sovereign is clearly demonstrated by the case on which the petitioners clearly rely, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). The *Larson* opinion teaches that the actions of state officials that are not attributable to the state-- are *ultra vires* – in two different types of situations: (1) when the official is engaged in conduct that the sovereign has not authorized, and (2) when he has engaged in conduct that sovereign has forbidden. A sovereign, like any other principal, cannot authorize its agent to violate the law. When an agent does so, his actions are

considered *ultra vires* and he is liable for his own conduct under the law of agency. Both types of *ultra vires* conduct are clearly identified in *Larson.*"

CONCLUSION

Certainly the sovereign speaking through this Court cannot authorize the General Assembly to violate the one subject rule of the Ohio Constitution in S.B. 108 and allow the defendant legislators to moot Appellants' case before this Court a second time. Certainly in this case, this Court cannot allow to stand, the Attorney General's defense of the legislators sued in their individual capacity, that is compelled by Ohio's statutory scheme. The Attorney General's defense in the presence of the defendant legislators' continuous ultra vires acts, in the context of the adjudicated Sheward decision, supra, and the resultant breach of their fiduciary duty to this State & Appellants, for having received and retained lobbyists money for enacting Am.Sub.H.B. No. 350, that was adjudicated to have usurped judicial authority, an ultra vires act, is inter alia., a substantive Due Process denial of Appellants' rights under the U.S. 14th Amendment Constitution and the Ohio Constitution as well as a denial of Equal Protection clauses thereunder.

These developments discussed above, when read in pari materia with Appellants' Memorandum in Support of Jurisdiction herein, involve substantial constitutional questions of public or great general interest, warranting this Court to reconsider it October 24, 2001 order and grant Appellants their discretionary appeal.

Respectfully submitted,

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